No. 16-1348	
Title:	**Michael Nelson Currier, Petitioner** **v.** **Virginia**
Docketed:	May 8, 2017
Linked with 16A810	
Lower Ct:	Supreme Court of Virginia
Case Numbers:	(160102)
Decision Date:	December 8, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 09 2017	Application (16A810) to extend the time to file a petition for a writ of certiorari from March 8, 2017 to May 7, 2017, submitted to The Chief Justice.
Feb 14 2017	Application (16A810) granted by The Chief Justice extending the time to file until May 7, 2017.
May 08 2017	Petition for a writ of certiorari filed. (Response due June 7, 2017)
May 25 2017	Waiver of right of respondent Virginia to respond filed.
Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 07 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jun 13 2017	Response Requested. (Due July 13, 2017)
Jun 21 2017	Order extending time to file response to petition to and including August 10, 2017.
Aug 04 2017	Brief of respondent Virginia in opposition filed.
Aug 15 2017	Reply of petitioner Michael N.Currier filed.

Aug 16 2017	DISTRIBUTED for Conference of 9/25/2017.
Sep 25 2017	Record Requested.
Sep 29 2017	Record received from the Supreme Court of Virginia (4 volumes).
Oct 02 2017	DISTRIBUTED for Conference of 10/6/2017.
Oct 10 2017	DISTRIBUTED for Conference of 10/13/2017.
Oct 16 2017	Petition GRANTED.
Nov 13 2017	Blanket Consent filed by Petitioner, Michael N.Currier **Blanket Consent**
Nov 16 2017	Blanket Consent filed by Respondent, Virginia **Blanket Consent**
Nov 30 2017	Brief of petitioner Michael N.Currier filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 30 2017	Joint appendix filed. (Statement of costs filed.) **Main Document** **Proof of Service**
Dec 07 2017	Brief amicus curiae of Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 07 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	SET FOR ARGUMENT ON Tuesday, February 20, 2018
Jan 02 2018	Brief of respondent Virginia filed. **Main Document** **Proof of Service** **Other**
Jan 05 2018	CIRCULATED
Jan 09 2018	Brief amicus curiae of United States filed. (Distributed) **Proof of Service** **Main Document**
Jan 09 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

	Proof of Service **Main Document**
Jan 09 2018	Brief amici curiae of State of Indiana, et al. filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Jan 10 2018	Record requested from the Supreme Court of Virginia
Jan 22 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 01 2018	Reply of petitioner Michael N.Currier filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 20 2018	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Matthew R. McGuire, Deputy Solicitor General of Virginia, Richmond, Va.; and Erica L. Ross, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae).

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RECORD AND BRIEFS

16-1348

No. 16-

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael N. Currier respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court.

OPINIONS BELOW

The order of the Virginia Supreme Court (Pet. App. 1a) is published at 292 Va. 737. The opinion of the Virginia Court of Appeals (Pet. App. 2a) is published at 779 S.E.2d 834.

JURISDICTION

The Virginia Supreme Court entered its judgment on December 8, 2016. Pet. App. 1a. On February 14, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including Sunday, May 7, 2017, No. 16A810, making it due Monday, May 8, 2017 under S. Ct. Rule 30.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."

STATEMENT OF THE CASE

This case presents an important question, over which federal courts of appeals and state high courts are openly and intractably divided, concerning the issue preclusion component of the Double Jeopardy Clause.

A. Legal background

The Double Jeopardy Clause of the Fifth Amendment protects a person from being "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Clause embraces the principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Yeager v. United States*, 557 U.S. 110, 117-18 (2009) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

This principle carries "particular significance" when an initial trial results in an acquittal. *United States v. Scott*, 437 U.S. 82, 91 (1978). Our criminal justice system is built on the premise that "[a] jury's verdict of acquittal represents the community's collective judgment" that the prosecution has failed to prove its allegations. *Yeager*, 557 U.S. at 122. Accordingly, an acquittal's finality "is unassailable," *id.* at 122-23, and "absolute," *Burks v. United States*, 437 U.S. 1, 16 (1978).

To protect the integrity of acquittals, the Double Jeopardy Clause embodies the doctrine of issue

preclusion, also known as collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *see also Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016) (preferring the term "issue preclusion" to "collateral estoppel"). Issue preclusion dictates that where a jury's acquittal has necessarily decided an issue of ultimate fact in the defendant's favor, the Double Jeopardy Clause bars the prosecution "from trying to convince a different jury of that very same fact in a second trial." *Bravo-Fernandez*, 137 S. Ct. at 359. Particularly now that "prosecutors [can] spin out a startlingly numerous series of offenses from a single alleged criminal transaction," the issue preclusion doctrine ensures that individuals who are acquitted cannot be forced to defend a second time against functionally the same allegations. *Ashe*, 397 U.S. at 445 n.10.

B. Factual and procedural background

1. In March 2012, a large safe containing approximately $71,000 in cash and twenty firearms was stolen from the home of Paul Garrison II in Albemarle County, Virginia. A few days later, police recovered the safe from a nearby river. It had been forcibly opened. All twenty firearms remained in the safe, but most of the cash was gone.

A neighbor reported that she had seen a pickup truck leaving the Garrison residence around the time of the theft. The police linked that truck to Garrison's nephew, Bradley Wood. Executing a warrant to search Wood's truck, the police found metal shavings and insulating material in the truck's bed. These items appeared to match materials collected from the floor of the Garrison residence, near where the safe

had been. The police also collected a cigarette butt from the bed of the truck.

The Commonwealth of Virginia charged Wood with the theft. After initially denying his involvement, he pleaded guilty. Hoping for a more lenient sentence, Wood began cooperating with the police and implicated his cousin as an accomplice. *See* Va. Ct. App. Jt. App. ("Jt. App.") 188, 228-29. The detective, however, believed that Wood was lying and declined to pursue charges against the cousin. Wood then claimed that petitioner had participated in the theft. The two men had met in prison and had sold firewood together after their release. *Id.* 401-02, 414.

2. The Commonwealth indicted petitioner on three charges: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after being convicted of a felony. Pet. App. 4a. The firearm charge was based on the theory that he had briefly handled the guns inside the safe while removing the cash.

In Virginia, as elsewhere, "evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial" and generally "inadmissible." *Hackney v. Commonwealth*, 504 S.E.2d 385, 388 (Va. Ct. App. 1998) (en banc). Therefore, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Id.* at 389; *see also* Pet. App. 9a.

The parties acceded to that procedure here. Trying all three charges simultaneously would have unduly prejudiced petitioner by bringing his prior

convictions to the attention of the jury to which the breaking-and-entering and grand larceny charges would be tried. *See* Pet. App. 9a. Accordingly, the trial court severed the felon-in-possession charge from the other two charges. *Id.* 4a.

3. The Commonwealth elected to first try petitioner for breaking and entering and grand larceny. It offered two primary strands of evidence. First, Wood testified that petitioner broke into the Garrison residence and stole the safe with him. Jt. App. 230. Second, the neighbor testified that she saw petitioner riding as a passenger in the pickup truck as it was leaving the Garrison residence. *Id.* 161-63, 206. The Commonwealth also attempted to introduce evidence that the cigarette butt recovered from the bed of the pickup truck carried petitioner's DNA, but the court excluded this evidence because the prosecution failed to disclose it in time. *See id.* 480-81.

The defense argued that petitioner was not present and played no role in the theft. Consequently, both sides agreed that the sole issue before the jury was whether petitioner was involved in stealing the safe. In his closing remarks to the jury, the prosecutor asked: "What is in dispute? Really only *one issue and one issue alone.* Was the defendant, Michael Currier, one of those people that was involved in the offense?" Jt. App. 256 (emphasis added). The defense attacked the weaknesses in the Commonwealth's evidence and warned the jury that "[u]nreliable testimony is how innocent people go to jail." *Id.* 277-83.

The jury acquitted petitioner of both charges concerning the theft of the safe. Pet. App. 4a.

4. The Commonwealth insisted on pressing ahead with the felon-in-possession prosecution. In response, petitioner asserted that the issue preclusion component of the Double Jeopardy Clause barred the Commonwealth from trying to convince a second jury that he had been involved in the break-in and theft. Pet. App. 5a. In a related motion, petitioner asked to have the felon-in-possession charge dismissed outright, emphasizing that "if he did not steal the firearms[,] he cannot [have] possess[ed] the firearms." Jt. App. 293.

The trial court denied both motions. Pet. App. 5a. It described the issue preclusion doctrine as concerned with "prevent[ing] the Commonwealth from subjecting the accused to the hazards of *vexatious* multiple prosecutions." Jt. App. 306 (emphasis added). Reasoning that the Commonwealth had not sought separate trials for the purpose of harassing petitioner—to the contrary, it had been required to try the charges separately to avoid unduly prejudicing him—the court held that this concern was not implicated. *Id.* 306.

The case then proceeded to trial for a second time. The Commonwealth advanced the same basic theory as in the first trial: that petitioner broke into the Garrison residence and helped steal the safe containing cash and firearms. *See* Jt. App. 449-53.

But given the second opportunity to convince a jury of petitioner's involvement in the break-in and theft, the Commonwealth modified its presentation in two ways. First, the Commonwealth's key witnesses refined their testimony and redelivered it with greater poise. For example, the Garrisons' neighbor had testified at the first trial that she "didn't suspect

anything" when she saw the pickup truck leaving the house. Jt. App. 216. At the second trial, however, she testified that she had seen the safe in the back of the truck as it left the house, and even specified that she "could see the knob" on the safe. *Id.* 386, 393. And at the second trial, Wood anticipated and preemptively denied the defense's suggestion that he had accused petitioner of participating in the theft because they had had a falling out. *Compare id.* 248, *with id.* 414-15. Having already undergone cross-examination once, Wood told petitioner's attorney: "I know where this story is going . . . . [I]t's the same story you used last time." *Id.* 414. Second, the Commonwealth corrected its procedural error from the first trial by successfully introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that petitioner had at some point been in Wood's truck. *See id.* 480-81.

This time, the jury found petitioner guilty and sentenced him to five years in prison. Pet. App. 5a.

Petitioner moved to set aside the verdict on double jeopardy grounds. Pet. App. 5a. The trial court acknowledged that the jury in the first trial had necessarily rejected the theory the Commonwealth renewed in the second trial: "If they didn't find him guilty of [stealing] the safe, they didn't find him guilty of [possessing] the guns" inside it. Jt. App. 488. The court, however, denied petitioner's motion. It reasoned that issue preclusion did not apply because the severance had not been "an attempt by the government to infringe upon [petitioner's] Fifth Amendment protection against double jeopardy, but rather to protect [petitioner]" from undue prejudice. *Id.* 489.

5. The Virginia Court of Appeals affirmed. Pet. App. 2a. It recognized that "[c]ourts are divided" over whether issue preclusion applies "when the defendant has obtained severance of the charges against him and the first trial results in an acquittal." *Id.* 10a n.2 (citing several decisions on each side of the conflict). And it acknowledged that "[o]ne of the purposes of the [Double Jeopardy Clause] is to protect final judgments." *Id.* 6a. Nevertheless, the court held that issue preclusion did not apply because the Clause's other purpose—preventing prosecutorial "overreaching through successive trials"—was not implicated. *Id.* 5a-6a. It saw no "overreaching" in this case because the separate trials occurred "with the defendant's consent and for his benefit." *Id.* 10a.

6. The Virginia Supreme Court granted discretionary review and affirmed. Pet. App. 1a. In lieu of writing an opinion, the court issued a published order adopting as its own "the reason[ing] stated in the opinion of the Court of Appeals." *Id.*

REASONS FOR GRANTING THE WRIT

Federal courts of appeals and state courts of last resort are divided four-to-four over whether a defendant who consents to sequential trials retains his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

This Court should grant certiorari to resolve this conflict. Issue preclusion is "an extremely important principle in our adversary system of justice." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). And the question whether that constitutional protection applies in the situation here affects choices ranging from charging

decisions to plea bargaining to trial strategy. Finally, the Virginia Supreme Court's holding here is incorrect. Criminal defendants do not waive the right to issue preclusion simply by consenting to severance. Nor does the absence of prosecutorial overreaching in producing sequential trials obviate the Double Jeopardy Clause's command to afford absolute finality to an acquittal.

I. Federal and state courts are intractably divided over the question presented.

As the Virginia Court of Appeals recognized—and multiple other courts have acknowledged—there is a deep and mature conflict over whether the issue preclusion component of the Double Jeopardy Clause applies when a defendant consents to sequential trials and is acquitted at the first trial. *See* Pet. App. 10a n.2 ("[c]ourts are divided"); *Joya v. United States*, 53 A.3d 309, 318-19, 319 n.20 (D.C. 2012) ("[c]ourts have not been uniform"); *State v. Butler*, 505 N.W.2d 806, 809-10 (Iowa 1993) ("courts have split"). This conflict stems from confusion over the reach of this Court's decisions in *Jeffers v. United States*, 432 U.S. 137 (1977), and *Ohio v. Johnson*, 467 U.S. 493 (1984).

1. Two state courts of last resort—including the Virginia Supreme Court—and two federal courts of appeals have held that defendants lose their right to the preclusive effect of an acquittal by consenting to sequential trials. *See* Pet. App. 1a; *United States v. Blyden*, 964 F.2d 1375, 1379 (3d Cir. 1992); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *State v. Chenique-Puey*, 678 A.2d 694, 698-99 (N.J. 1996). Two state intermediate courts have reached the same conclusion. *See People v. Cohen*,

No. 191062, 1998 WL 1987006, at *1 (Mich. Ct. App. Dec. 29, 1998), *appeal denied*, 601 N.W.2d 388 (Mich. 1999); *State v. Alston*, 346 S.E.2d 184, 187-88 (N.C. Ct. App. 1986), *aff'd on other grounds*, 374 S.E.2d 247, 248 (N.C. 1988).

These courts invoke two related rationales. First, they reason that defendants who consent to severance waive their right to the preclusive effect of an acquittal. In reaching this conclusion, these courts rely on *Jeffers*, where the plurality concluded that defendants who object to trying multiple charges together at a joint trial "waive[]" their double jeopardy right against successive prosecutions for greater and lesser-included offenses. 432 U.S. at 142, 153 n.21, 154. According to courts on this side of the split, defendants who agree to sequential trials not only waive the right against successive prosecutions but also are "precluded from then asserting . . . collateral estoppel." *See Chenique-Puey*, 678 A.2d at 698; *see also* Pet. App. 10a (stressing petitioner's "consent" to sequential trials); *Ashley Transfer*, 858 F.2d at 227 (emphasizing "defendants' choice" to have sequential prosecutions).

Second, these courts rely on *Johnson*, where the Court explained that the Double Jeopardy Clause's protection against successive prosecutions for the same offense does not apply where there "has been none of the governmental overreaching that double jeopardy is supposed to prevent." 467 U.S. at 502. These courts reason that issue preclusion similarly does not apply unless sequential trials are caused by "prosecutorial overreaching." Pet. App. 9a (quoting *Johnson*, 467 U.S. at 501); *see also Ashley Transfer*, 858 F.2d at 227.

2. In contrast, three state courts of last resort and one federal court of appeals have held that there is "no reason to conclude" that defendants who consent to sequential trials lose their issue preclusion rights. *State v. Butler*, 505 N.W.2d 806, 810 (Iowa 1993); *see also United States v. Aguilar-Aranceta*, 957 F.2d 18, 22-23 (1st Cir. 1992), *cert. denied*, 506 U.S. 834 (1992); *Joya v. United States*, 53 A.3d 309, 319 (D.C. 2012); *Gragg v. State*, 429 So. 2d 1204, 1208 (Fla. 1983), *cert. denied*, 464 U.S. 820 (1983). The Pennsylvania Superior Court (the state's intermediate court) has issued a thorough opinion taking the same position, *Commonwealth v. Wallace*, 602 A.2d 345, 349 (Pa. Super. Ct. 1992), which the Pennsylvania Supreme Court has cited with approval, *see Commonwealth v. States*, 938 A.2d 1016, 1023 & n.8 (Pa. 2007).[1]

These courts reason that *Jeffers* "turned on application of the . . . protection against successive prosecutions," *Joya*, 53 A.3d at 316, whereas issue preclusion "is an entirely separate claim that mandates a separate analysis," *Butler*, 505 N.W.2d at 808-09. Conducting that analysis, these courts conclude that a defendant's consent to sequential trials does not waive his right to the preclusive effect of an acquittal. *See Joya*, 53 A.3d at 319; *Gragg*, 429 So. 2d at 1208; *Butler*, 505 N.W.2d at 810.

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[1] The Louisiana Supreme Court has also applied issue preclusion in a case where a felon-in-possession charge was severed from another charge and the defendant was acquitted at the first trial. *State v. Blache*, 480 So. 2d 304, 306 (La. 1985). The court did not expressly state, or otherwise deem it material, whether the defendant consented to the severance.

These courts also reject the notion that issue preclusion applies only when sequential trials are caused by prosecutorial overreaching. These courts reason that issue preclusion—in contrast to the general prohibition against multiple prosecutions involved in *Johnson*—applies regardless of the reason for having multiple trials. This is because the Double Jeopardy Clause's issue preclusion component is grounded in the need to respect the integrity of acquittals, not the interest in preventing prosecutorial overreaching. *See, e.g.*, *Joya*, 53 A.3d at 315-17.

II. The question presented is important.

The question whether the Double Jeopardy Clause's issue preclusion component applies in the circumstances presented here is a frequently recurring issue that has significant implications for the criminal justice system.

1. Prosecutors often bring multiple charges together in circumstances where evidence admissible on one charge would cause undue prejudice to the defendant on another charge. Cases in which the prosecution brings a felon-in-possession charge alongside other charges illustrate this point.[2] Courts

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[2] Every state and the federal government restrict possession of firearms by felons. *See, e.g.*, 18 U.S.C. § 922(g); D.C. Code § 22-4503; Va. Code Ann. § 18.2-308.2. At the federal level alone, 4984 people (7% of offenders) were convicted of violating Section 922(g) in fiscal year 2015. U.S. Sentencing Comm'n, Quick Facts: Felon in Possession of a Firearm 1 (July 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY15.pdf.

"have long recognized that where a felon-in-possession charge is joined with other counts, the defendant may be unduly prejudiced with respect to the other counts by the introduction of prior crimes evidence that would otherwise be inadmissible." *United States v. Myles*, 96 F.3d 491, 495 (D.C. Cir. 1996); *see also* 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice and Procedure § 222, at 582-83 (4th ed. 2008) (calling the risk of undue prejudice "especially acute" where a felon-in-possession charge is joined with other charges).

Criminal defendants therefore regularly seek severance, triggering the question presented if they are acquitted at the first trial. Again, cases including felon-in-possession charges are illustrative. The prosecution often alleges that a defendant must have possessed a firearm because he committed another offense, such as a shooting, involving a gun. If a jury in such a case determines that the defendant was not the one who committed the other offense, and the prosecution seeks to relitigate that issue at the felon-in-possession trial, then the question presented arises. *See, e.g.*, *Jackson v. State*, 183 So. 3d 1211, 1212 (Fla. Dist. Ct. App. 2016); *State v. Butler*, 162 So. 3d 455, 458-59 (La. Ct. App. 2015). Other combinations of charges also give rise to the question presented. *See, e.g.*, *Joya v. United States*, 53 A.3d 309, 312 (D.C. 2012) (charges severed because gang evidence admissible on one charge would be unduly prejudicial with regard to other charges); *State v. Chenique-Puey*, 678 A.2d 694, 698-99 (N.J. 1996) (charges severed because proving charge predicated on a domestic violence restraining order would be unduly prejudicial with regard to the other charge).

2. Even when the double jeopardy issue here is not directly litigated, it looms over virtually every criminal case in which severance is a possibility. When—as is almost always the case—a single episode implicates numerous criminal statutes, defendants need to know whether issue preclusion applies so they can make informed decisions about whether to consent to severance. If consenting to severance means waiving issue preclusion, a defendant might prefer a joint trial. Or, faced with the prospect of two prosecutorial bites at the apple, he might simply take a plea deal.

Prosecutors, for their part, need to know the answer to the question presented to make informed decisions. If a defendant's consent to severance waives issue preclusion, a prosecutor can add charges that present the defendant with a choice between severing the charges to avoid undue prejudice and preserving his right to issue preclusion. If, on the other hand, issue preclusion remains available to defendants who consent to severance, the prosecution may wish to object to severance. And if the court nonetheless severs the charges, the prosecution may wish to try the severed charges in an order that minimizes the chance that issue preclusion will come into play.

III. This case presents an ideal vehicle for resolving the conflict.

1. This case comes to the Court in the best posture for resolving the question presented. Petitioner raised his double jeopardy argument at every stage of the state court proceedings, and each court squarely addressed it. *See* Pet App. 1a, 5a-10a. Further, this case comes to the Court on direct

review, enabling the Court to reach the question without any of the complications that sometimes attend habeas cases.

2. The answer to the question presented determines the outcome of petitioner's case.

If issue preclusion applies, petitioner's conviction must be reversed. The preclusive effect of an acquittal turns on what a jury necessarily decided, "taking into account the pleadings, evidence, charge, and other relevant matter." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (citation omitted); *see also Yeager v. United States*, 557 U.S. 110, 119-20 (2009). At petitioner's first trial, the jury was presented with "only one issue": whether petitioner was "one of those people that was involved" in the break-in and theft of the gun-filled safe. Jt. App. 256; *see also supra* at 5. In acquitting him, the jury necessarily decided that he was not. Therefore, if issue preclusion applies, the Commonwealth should have been precluded from relitigating that issue in any subsequent trial.

Indeed, applying the Double Jeopardy Clause's issue preclusion component here would almost certainly result in an outright dismissal of the felon-in-possession charge. The Commonwealth cannot reasonably argue that petitioner possessed the stolen firearms without relitigating his involvement in the break-in and theft. That is, petitioner could not have possessed the firearms unless he participated in the theft. The trial court acknowledged as much when considering petitioner's double jeopardy argument, observing that if the first jury "didn't find him guilty of [stealing] the safe, they didn't find him guilty of [possessing] the guns." Jt. App. 488.

IV. The Virginia Supreme Court's decision is incorrect.

This case implicates the core concerns animating the Double Jeopardy Clause's issue preclusion doctrine. Contrary to the Virginia Supreme Court's conclusion, the facts that severance occurred "with the defendant's consent and for his benefit," Pet. App. 10a, provide no basis for suspending the protection that doctrine affords to an acquittal.

A. The Commonwealth's attempt to relitigate petitioner's alleged involvement in the break-in and theft violates the double jeopardy protection established in *Ashe v. Swenson*, 397 U.S. 436 (1970), and reaffirmed in cases up through *Yeager v. United States*, 557 U.S. 110 (2009). *Ashe* involved the simultaneous robbery of several people at a poker game. "[A]fter a jury determined by its verdict that the petitioner was not one of the robbers," the question arose whether "the State could constitutionally hale him before a new jury to litigate that issue again." *Ashe*, 397 U.S. at 446. This Court held that it could not, explaining that the prosecution's attempt to relitigate the question of identity in the second trial was "constitutionally no different" from attempting to try Ashe again for the exact same charge. *Id.* Giving the prosecution an opportunity to refine its case after an acquittal is "precisely what the constitutional guarantee forbids." *Id.* at 447; *see also Burks v. United States*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.").

This case is just like *Ashe* in every way that matters. The first jury acquitted petitioner of the breaking-and-entering and larceny charges, necessarily deciding that he had not participated in the theft of the safe and its contents. The prosecution then haled petitioner before a new jury and seized the opportunity to refine its case. At the second trial, the prosecution's witnesses refined their testimony and redelivered it with greater confidence. The prosecution also introduced evidence (the cigarette butt) that had been excluded from the first trial due to its own error. *Compare Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) (applying issue preclusion to bar a second trial in which the prosecution sought to admit evidence that had been excluded from the first trial). And in the end, the Commonwealth secured a conviction by persuading a second jury of the very thing it tried and failed to prove at the first trial: that petitioner stole a safe full of guns.

B. The Virginia Supreme Court gave two reasons for refusing to apply issue preclusion here: (1) petitioner, unlike the defendant in *Ashe*, consented to sequential trials; and (2) the sequential trials were not the product of "prosecutorial overreaching." Pet. App. 9a-10a. Neither of these arguments withstands scrutiny.

1. Petitioner did not waive issue preclusion by consenting to severance of the charges against him.

a. This Court has held that defendants can waive constitutional rights when they take actions flatly inconsistent with the exercise of those rights. For example, a defendant waives his constitutional right to be present in the courtroom during trial by electing

to be absent, *Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (per curiam), or by "insist[ing] on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Similarly, a defendant forfeits his constitutional right to have an adverse witness testify in his presence if he causes "the absence of [that] witness by wrongdoing." *Davis v. Washington*, 547 U.S. 813, 833 (2006).

Jeffers v. United States, 432 U.S. 137 (1977), applies this logical incompatibility principle in the context of double jeopardy. In *Jeffers*, the defendant was convicted of a charge and then sought to bar the prosecution from convicting him of a greater offense in a second trial. A plurality of this Court concluded that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding," there was no violation of the Double Jeopardy Clause because the defendant had "elect[ed]" at the outset of the prosecution to have the two offenses tried separately. *Id.* at 152. In other words, when a defendant seeks to have multiple offenses tried separately, he "waive[s]" his mutually exclusive right against being subjected to more than one trial. *Id.* at 153 n.21.

A defendant's double jeopardy right to the preclusive effect of an acquittal, however, is "separate" from his right not to be subjected to more than one trial. *See United States v. Scott*, 437 U.S. 82, 92 (1978); *see also Yeager*, 557 U.S. at 117-19. A defendant who invokes issue preclusion is not objecting to the fact of a second trial as such, but rather is seeking to enforce the absolute finality of a

prior acquittal. *See Yeager*, 557 U.S. at 118-19. Indeed, issue preclusion does not necessarily preclude a second trial at all; the prosecution is free to press ahead with any theory the jury in the first trial did not reject. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357-58 (2016); *Joya v. United States*, 53 A.3d 309, 321-23 (D.C. 2012). That being so, nothing about consenting to separate trials is inconsistent with insisting upon the preclusive effect of an acquittal.

This Court's cases already recognize as much. The Court has rejected the "paradoxical contention" that a defendant waives the preclusive effect of an acquittal on one charge simply by seeking a new trial on a separate charge. *Green v. United States*, 355 U.S. 184, 191-92 (1957). And the year after deciding *Jeffers*, this Court relied on the same reasoning to hold that a defendant who asks an appellate court to grant him a new trial does not thereby waive his right to the preclusive effect of an acquittal issued by that appellate court (in the form of a holding that the evidence was legally insufficient to support a conviction). *Burks*, 437 U.S. at 17.[3]

The principle that defendants who consent to multiple trials do not waive their right to the

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[3] Several of this Court's Justices (including the author of *Jeffers*) similarly recognized in a case involving a different issue that "[t]here is no doubt that had the defendant in *Jeffers* been acquitted at the first trial, the collateral-estoppel provisions embodied in the Double Jeopardy Clause would have barred a second trial on the greater offense." *Green v. Ohio*, 455 U.S. 976, 980 (1982) (White, J., joined by Blackmun & Powell, JJ., dissenting from the denial of certiorari).

preclusive effect of an acquittal controls here. The mere fact that a defendant consents to severance has no bearing on whether the usual rules of issue preclusion apply at a second trial.

b. Instead of considering whether consenting to severance is logically inconsistent with insisting upon the preclusive effect of an acquittal, the Virginia Supreme Court appeared to view the waiver question as a general equitable inquiry. Even if such an inquiry were appropriate, the equities dictate that a defendant does not waive his right to issue preclusion by consenting to severance.

First, a defendant should not be saddled with a finding of waiver where the risk of undue prejudice left him with no legitimate choice but to consent to severance. In *Jeffers*, the plurality stressed that the charges against the defendant could have been tried together "without undue prejudice to [the defendant's] Sixth Amendment right to a fair trial." 432 U.S. at 153. Had the charges been severed to "ensure that prejudicial evidence . . . would not have been introduced," the outcome "might [have been] different." *Id.* at 153 n.21. And in *Green*, the outcome *was* different for similar reasons. This Court explained there that the law "does not[] place the defendant in such an incredible dilemma" that, to appeal a questionable conviction, he must "forego" the preclusive effect of an acquittal on another charge. *Green*, 355 U.S. at 192-93. A defendant in that position "has no meaningful choice" but to appeal the conviction. *Id.* at 192.

Here, petitioner could not have agreed to a joint trial on all three charges without suffering undue prejudice to his defense on the breaking-and-entering

and larceny charges. Severance was necessary to "avoid[] the undue prejudice that would occur upon mention of [petitioner's] felonious past to a jury." Pet. App. 9a; *see also Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (introducing evidence of past convictions against a defendant when that evidence is irrelevant to a charge "den[ies] him a fair opportunity to defend" against the charge).

Indeed, a failure to sever the charges here may well have "result[ed] in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). Courts have recognized that where a trial on multiple charges allows the prosecution to introduce otherwise inadmissible evidence of the defendant's other crimes, failing to sever the charges may violate the constitutional "right to a fair trial." *See, e.g.*, *Panzavecchia v. Wainwright*, 658 F.2d 337, 338, 342 (5th Cir. 1981). Surely a defendant in petitioner's situation cannot be forced "to waive one constitutional right in order to assert another." *Gragg v. State*, 429 So. 2d 1204, 1208 (Fla. 1983).

Second, petitioner's consent to severance did not deprive the Commonwealth of "its right to one full and fair opportunity to convict those who have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 502 (1984). In *Johnson*, the defendant was charged with murder and aggravated robbery as well as with the lesser-included offenses of involuntary manslaughter and grand theft. *Id.* at 494. Over the state's objection, the defendant pleaded guilty to the two lesser-included offenses. *Id.* He then convinced the trial court to dismiss the two greater charges on double jeopardy grounds. *Id.* This Court reversed, rejecting

the notion that the defendant could "use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution of the remaining charges." *Id.* at 502.

Unlike the bar on successive prosecutions the defendant tried to assert in *Johnson*, issue preclusion does not function as a sword preventing the prosecution from pursuing all of its allegations. Rather, issue preclusion springs into effect only to shield a defendant from being forced to relitigate an allegation a jury has already rejected. *State v. Butler*, 505 N.W.2d 806, 810 (Iowa 1993). And when issue preclusion applies, the prosecution remains free to pursue the remaining charges on any theory it has not already litigated and lost. *See, e.g.*, *Joya*, 53 A.3d at 321-23.

2. The Virginia Supreme Court was also incorrect in refusing to find a double jeopardy violation on the ground that the sequential trials were not the product of "prosecutorial overreaching."

This Court has long held that the Double Jeopardy Clause's bar against relitigating issues decided against the prosecution applies "irrespective of the good faith of the State in bringing successive prosecutions." *Harris*, 404 U.S. at 56-57. Just two years after *Ashe*, this Court held that an acquittal on one charge triggered issue preclusion for a second charge even though "under state law, [the two charges] could not be joined in one indictment." *Turner v. Arkansas*, 407 U.S. 366, 367, 370 (1972) (per curiam). Issue preclusion applies in that context because it is designed to protect the sanctity of acquittals, not simply to guard against sequential trials. *See Yeager*, 557 U.S. at 118-19.

Courts that have nevertheless held that the issue preclusion doctrine is suspended when multiple trials occur for the defendant's benefit have pointed to a footnote in *Johnson* that they acknowledge is "dictum" but that they believe counsels a contrary result. *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988). In that footnote, this Court stated that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Johnson*, 467 U.S. at 500 n.9.

But this Court's subsequent decision in *Yeager* squelches any doubt that the preclusive effect of an acquittal attaches regardless of whether the prosecution sought successive trials. In *Yeager*, the government tried the defendant on several charges. 557 U.S. at 113. The jury acquitted on some but hung on others. *Id.* at 115. The defendant then asserted that the acquittals prevented the government from retrying him on hung charges that would require relitigating allegations the jury had rejected. *Id.* The government—and this Court's dissenters—countered that issue preclusion did not apply because the government had "made no effort to prosecute the charges seriatim." *Id.* at 131 (Scalia, J., dissenting) (quoting *Johnson*, 467 U.S. at 500 n.9). But this Court sided with the defendant, holding that *Ashe* applied because the finality of an acquittal is itself sufficient to trigger issue preclusion. *See id.* at 112, 117-20.

The bottom line is that "[a] jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments

presented to it." *Yeager*, 557 U.S. at 122. Preserving the finality of an acquittal is therefore vitally important to the integrity and proper functioning of the criminal justice system, regardless of any prosecutorial overreaching in creating sequential trials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 8, 2017

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF VIRGINIA

Held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of December, 2016.

Michael Nelson Currier, Appellant,	Record No. 160102
against	
Commonwealth of Virginia, Appellee.	Court of Appeals No. 1428-14-2

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

In this case, we awarded appellant an appeal from the judgment of the Court of Appeals holding that the trial court did not err in its denial of the appellant's motion to set aside the jury verdict on the basis of collateral estoppel. *Currier v. Commonwealth*, 65 Va. App. 605, 609-14, 79 S.E.2d 834, 836-38 (2015).

We have considered the record, briefs, and argument of counsel, and for the reasons stated in the opinion of the Court of Appeals, we will affirm the judgment.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of Albemarle County and shall be published in the Virginia Reports.

Justice McCullough took no part in the consideration of this case.

A Copy,

Teste: *Pati L. Harrington*

Patricia L. Harrington, Clerk

APPENDIX B

COURT OF APPEALS OF VIRGINIA

Present: Judges Alston, McCullough and Senior Judge Clements
Argued at Richmond, Virginia

MICHAEL N. CURRIER

v.

COMMONWEALTH OF VIRGINIA

Record No. 1428-14-2

OPINION BY JUDGE STEPHEN R. McCULLOUGH

DECEMBER 15, 2015

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
Cheryl V. Higgins, Judge

PUBLISHED

J. Addison Barnhardt (Grisham & Barnhardt, PLLC, on briefs,) for appellant.

Susan Baumgartner, Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Michael N. Currier challenges his conviction for possession of a firearm after having been convicted of a violent felony. He argues that the Double Jeopardy Clause, and particularly its collateral estoppel protections, bar his conviction. He also contends that the trial court abused its discretion in concluding that evidence of appellant's involvement in a breaking and entering and a grand larceny were relevant and not prejudicial to his charge of being a felon in possession of a firearm. We disagree and affirm.

BACKGROUND

Paul Garrison, II, returned home from work on March 7, 2012 to find that someone had broken into his home. A large gun safe containing cash, personal papers, and 20 guns was gone. The safe was later located, partially submerged in the Rockfish River in Nelson County. Police recovered it and discovered that the lock mechanism had been destroyed and removed. The firearms were badly damaged from the water.

A neighbor testified that she had noticed a lot of "loud banging" and "loud noises" coming from the Garrison residence across the street. She looked out from her front porch and observed an older model white pickup truck with an orange stripe coming out of the Garrisons' driveway. She noticed two individuals in the truck and said there may have been a third. There was a safe on the bed of the pickup truck. She could not identify the driver due to the glare on the windshield. However, she positively identified appellant as the passenger from a photographic lineup and at trial.

Police developed Bradley Wood as a suspect. Wood is Garrison's nephew, and he had been to the Garrisons' house before. Wood implicated appellant in the crime. Wood, a felon with an extensive criminal record, had entered into a plea agreement with the Commonwealth. He testified at trial that he had known appellant from prison. Wood thought there would be a large sum of money in the safe. Wood mentioned this to appellant, who responded that "he was in the red on child support and he really needed some money."

Wood and appellant broke into the Garrisons' home and initially tried to cut the safe open with a cutting torch, but failed. They returned with Wood's truck, loaded the safe onto the truck, and drove away with it. They were eventually able to open the safe. Appellant took out the guns and loaded them onto the bed of the truck. They later placed the guns back in the safe and pushed the safe into the water.

When police located the truck and processed it for evidence, it appeared as if its bed had been recently washed. Nevertheless, police found the white insulation from the gun safe that matched what they found in the Garrisons' home, metal shavings, and a cigarette butt containing appellant's DNA.

Officer William Underwood testified concerning his efforts to apprehend appellant. He conducted surveillance on a particular location where appellant was thought to be staying. He turned to the U.S. Marshal Service for assistance in locating appellant, and ultimately arrested him outside of a motel in Buckingham County. Underwood obtained warrants on March 7, 2012, but appellant was not arrested until October 18, 2012.

A single grand jury indicted appellant on the same date for burglary, grand larceny, and possession of a firearm as a convicted felon. Prior to trial, the defense and the prosecution agreed to sever the firearm charge from the grand larceny and the breaking and entering charges. The case proceeded to trial on the burglary and grand larceny charges, and a jury acquitted appellant of both charges.

When the Commonwealth sought to try appellant on the remaining charge of felon in possession of a

firearm, appellant objected. He argued that the collateral estoppel protections embodied in the Double Jeopardy Clause precluded his retrial on the felon in possession of a firearm charge or, in the alternative, barred the Commonwealth from presenting evidence of his involvement in the theft and burglary of the Garrisons' home. The circuit court disagreed. The court also held that the evidence of his involvement in the burglary and larceny was relevant and that its relevance outweighed its prejudicial effect. Following a jury trial, appellant was convicted and sentenced to serve five years in prison. Appellant filed a motion to set aside the jury verdict, again raising the issue of collateral estoppel. The trial court denied the motion.

ANALYSIS

I. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR A SECOND TRIAL.

Appellant argues that his acquittal in the prior trial means that the jury in that proceeding resolved the factual issues in his favor. Therefore, he contends, he cannot be tried anew on the firearm charge in a separate trial. The Commonwealth responds, among other arguments, that we need not even undertake the collateral estoppel analysis because of the posture of this case. Specifically, the Commonwealth notes that in this instance, all the charges were brought by a single grand jury, and would have been heard in a single proceeding, but the cases were severed to avoid any undue prejudice to the defendant that would stem from a single trial. In other words, this scenario does not bring into play the concern that lies at the core of the Double Jeopardy Clause: the avoidance of

prosecutorial oppression and overreaching through successive trials. We agree with the Commonwealth.

"Whether there has been a double jeopardy violation presents a question of law requiring a de novo review." *Fullwood v. Commonwealth,* 279 Va. 531, 539, 689 S.E.2d 742, 747 (2010).

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "Although the documentary history of the Double Jeopardy clause is scanty, the available evidence suggests that the draftsmen of the Bill of Rights intended to import into the Constitution the common law protections much as they were described by Blackstone." *United States v. Jenkins,* 490 F.2d 868, 873 (2d Cir. 1973) (Friendly, J.) (tracing the history of the Clause), *aff'd,* 420 U.S. 358 (1975).

As a textual matter, the crime of possessing a firearm as a convicted felon is not the "same offense" as burglary or larceny. Therefore, a plain language reading of the clause would lead to the conclusion that appellant could be tried on the firearm charge after acquittal on the other charges. The Supreme Court, however, has interpreted the Double Jeopardy Clause according to the purposes it is designed to serve rather than according to its literal language. Thus, for example, the Supreme Court made clear at an early date that the protections of the clause are not limited to crimes where "life and limb" are at stake. Instead, its protections extend to all criminal offenses. *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 173 (1874).

One of the purposes of the clause is to protect final judgments. *Crist v. Bretz,* 437 U.S. 28, 33 (1978). To

this end, the clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). The clause, however, is not "simply res judicata dressed in prison grey." Notes & Comments, *Twice In Jeopardy,* 75 Yale L.J. 263, 267 (1965). Its aim is to prevent "oppressive practices" by the prosecution. *Wade v. Hunter,* 336 U.S. 684, 689 (1949).

Appellant invokes the collateral estoppel protection component of the clause.

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Ashe v. Swenson, 397 U.S. 436, 443 (1970). Preventing prosecutorial abuse and overreaching lies at the root of the constitutionalization of the collateral estoppel doctrine. Although not part of the original conception of the clause, the Court observed that

> at common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and

> related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. As the number of statutory offenses multiplied, the potential for *unfair and abusive reprosecutions* became far more pronounced. The federal courts soon recognized the need *to prevent such abuses* through the doctrine of collateral estoppel . . . .

Id. at 446 n. 10 (citations omitted and emphasis added). The risk of unfair and abusive prosecutions was on full display in *Ashe*. The appellant was tried for robbing one of six participants in a poker game and was acquitted. *Id.* at 437-39. The prosecution then turned around and tried appellant for robbing a different participant. *Id.* at 439-40. He was convicted in this second trial. *Id.* at 440. The Court noted with dismay that "the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution." *Id.* at 447. The Court concluded that such a practice "is precisely what the constitutional guarantee forbids." *Id. Ashe* did not involve a situation where a charge was severed from a group of charges brought on the same date by the same grand jury, with one charge being severed for the benefit of the defendant and with his consent.

Every retrial or separate prosecution subjects the defendant to "embarrassment, expense, and ordeal and compel[s] him to live in a continuing state of anxiety and insecurity." *Green v. United States,* 355 U.S. 184, 187 (1957). The function of the Double Jeopardy Clause, however, is not to bar retrials or separate trials across the board. Rather, it bars a certain "*type*

of 'multiple prosecution,'" where "prosecutorial overreaching" is present. *Ohio v. Johnson,* 467 U.S. 493, 494, 501(1984) (emphasis added). *See also Burks v. United States,* 437 U.S. 1 (1978) ("The Double Jeopardy Clause forbids a second trial *for the purpose of* affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). Thus, for example, the clause does not bar a second trial for a defendant "who has succeeded in getting his first conviction set aside." *Pearce,* 395 U.S. at 720. Similarly, if the defendant pleads guilty to lesser charges over the objection of the prosecution, the Double Jeopardy Clause does not bar a trial on the more serious charges. *Johnson,* 467 U.S. at 494. The Court explained that in such a situation, "[t]here simply has been none of the governmental overreaching that double jeopardy is supposed to prevent." *Id.* at 502. The Supreme Court has refused to allow the defendant "to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.*

Appellant's firearm charge was severed by agreement between the defense and the prosecution, pursuant to our decision in *Hackney v. Commonwealth,* 28 Va. App. 288, 295 (1998). In *Hackney,* we held that "a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Id.* at 295. The point of separate trials here was to *benefit* the defendant by avoiding the undue prejudice that would occur upon mention of the defendant's felonious past to a jury. *See id.* at 293. The purpose of the Bill of Rights as a whole is to protect the

citizenry from abusive practices by the government. The specific abuse the Double Jeopardy Clause aims to prevent—including its collateral estoppel facet—is the practice of "unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 446 n. 10. That concern is not present when a trial proceeds on a charge that was severed from a combined original group of charges and the charge was severed with the defendant's consent and for his benefit. Accordingly, we decline to extend *Ashe* and we conclude that the trial court correctly found that collateral estoppel principles do not apply in this situation.[1]

Finally, *Yeager v. United States*, 557 U.S. 110 (2009), cited by appellant, does not compel a different outcome. The issue before the Court in that case was whether the prosecution could proceed with a new trial when a jury had acquitted the defendant on some charges but hung on others. *Id.* at 112. Holding that the counts on which the jury hung played no role in the collateral estoppel analysis, the Court concluded that appellant's retrial was barred by the collateral estoppel aspect of the Double Jeopardy Clause. *Id.* at 122-23. The Court in *Yeager* simply did not address the question before us today: whether collateral estoppel forecloses a second trial when the original proceeding was severed for appellant's benefit and with his consent.[2] We decline appellant's invitation to extend the holding in *Yeager* to these distinct facts.

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[1] In light of our holding, we need not address the Commonwealth's additional arguments for affirmance.

[2] Courts are divided with regard to whether collateral estoppel can bar a retrial when the defendant has obtained severance of the charges against him and the first trial results in

II. The Evidence of Appellant's Involvement in the Burglary and Larceny Was Relevant and the Trial Court Did Not Abuse its Discretion in Weighing its Probative Value Against its Prejudicial Effect.

Appellant argues that even if the trial could proceed, the trial court abused its discretion in

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an acquittal. *Compare United States v. Blyden*, 964 F.2d 1375, 1379 (3d Cir. 1992) (agreeing that "where the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy" (citation and internal quotation marks omitted)), *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 225-27 (4th Cir. 1988) ("Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy."), *and State v. Chenique-Puey*, 145 N.J. 334, 678 A.2d 694, 698-99 (1996) ("A defendant who moves to sever the trial of a charge of contempt of a domestic violence restraining order from the trial of an underlying offense should be precluded from then asserting double jeopardy or collateral estoppel bars to the subsequent prosecution."), *with United States v. Aguilar-Aranceta*, 957 F.2d 18, 22-23 (1st Cir. 1992) (concluding that the defendant had waived any double jeopardy claim through her consent to a mistrial, but going on to consider whether acquittal on one charge had a collateral estoppel effect on the retrial of the mistried charge), *Joya v. United States*, 53 A.3d 309, 315-19 (D.C. 2012) (holding that collateral estoppel may bar a retrial even where charges were severed at the defendant's request), *Gragg v. State*, 429 So.2d 1204, 1208 (Fla. 1983) (finding that a defendant's severance motion does not waive his right to assert the bar of collateral estoppel), *and State v. Butler*, 505 N.W.2d 806, 807-10 (Iowa 1993) (applying collateral estoppel to bar a separate trial that the defendant had moved to sever).

admitting testimony from the Garrisons and testimony from the police about tracking down appellant. He contends that the prejudicial effect of this evidence outweighed its probative value. He argues that the crime of possession of a firearm by a felon is a "victimless crime" and that this evidence served only to inflame the emotion of the jury.

"In order for evidence that the accused has committed other crimes to be admissible, it need only be relevant to prove a material fact or issue, and its relevance must outweigh the prejudice inherent in proving that an accused has committed other crimes." *Wilson v. Commonwealth*, 16 Va. App. 213, 220, *aff'd on reh'g en banc*, 17 Va. App. 248 (1993). "Such weighing is left to the discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion." *Teleguz v. Commonwealth*, 273 Va. 458, 482 (2007).

The felon in possession of a firearm charge would have made no sense isolated from its context: that appellant, in association with at least one other confederate, stole a safe in the hopes of recovering money, and there were some firearms inside the safe, which appellant briefly possessed. The evidence of the other crimes was thus necessary to explain how appellant came to possess the firearm.

> Where a course of criminal conduct is continuous and interwoven, consisting of a series of related crimes, the perpetrator has no right to have the evidence "sanitized" so as to deny the jury knowledge of all but the immediate crime for which he is on trial. The fact-finder is entitled to all of the relevant and

> connected facts, including those which followed the commission of the crime on trial, as well as those which preceded it; even though they may show the defendant guilty of other offenses.

Scott v. Commonwealth, 228 Va. 519, 526-27 (1984). The evidence established that the cigarette butt with appellant's DNA was found in a truck bed that had metal shavings and insulation consistent with what was found in the Garrisons' home.

"Flight by a defendant after the commission of a crime is probative evidence of guilt of that crime." *Lovitt v. Commonwealth,* 260 Va. 497, 512 (2000). The same is true of evidence that appellant was seeking to avoid contact with law enforcement officers after the commission of the crime. *Id.* at 513. The evidence of the extensive efforts needed to track down appellant was, therefore, relevant.

Finally, we find no abuse of discretion by the trial court in finding that the probative value of the evidence outweighed its prejudicial effect.

CONCLUSION

We affirm the judgment of the trial court.

Affirmed.

RECORD AND BRIEFS

No. 16-1348

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In The

Supreme Court of the United States

MICHAEL NELSON CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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August 4, 2017

QUESTIONS PRESENTED

The Double Jeopardy Clause's issue-preclusion component may preclude a future criminal trial when a defendant is acquitted by a jury in an earlier trial and the defendant carries his burden of showing that the jury necessarily determined an issue of ultimate fact that would need to be proven by the prosecution at the second trial. The issues presented are:

1) Whether the defendant has carried his burden of showing that the jury that acquitted him of breaking and entering and grand larceny necessarily found that he never possessed the guns that were stolen.

2) Whether a defendant who agrees to the severance of multiple charges for his benefit waives the issue-preclusion protection of the Double Jeopardy Clause.

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL NELSON CURRIER, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. On March 7, 2012, Michael Currier and Bradley Wood broke into the home of Paul and Brenda Garrison and stole a safe containing approximately $70,000, more than 20 guns, and various personal papers.[1] Although the money was missing, the safe was found with the guns and papers on the bottom of a local river.[2]

Soon after the crime was committed, Wood, the Garrisons' nephew, was identified as a suspect.[3] Wood confessed to the theft in exchange for a plea agreement

[1] Pet. App. 3a; *see also* Va. Ct. App. Jt. App. 68-70, 215, 351-53 [hereinafter "Jt. App."].

[2] *See* Pet. App. 3a.

[3] *See id.*; *see also* Jt. App. 87-91, 106.

and proceeded to inculpate multiple persons.[4] Currier was identified by Wood as an accomplice.[5]

Based on Wood's statements, detectives included Currier's picture in a photo array, which was shown to a neighbor who was at home when the Garrisons' home was broken into.[6] The neighbor testified at trial that "she had noticed a lot of 'loud banging' and 'loud noises' coming from the Garrison residence across the street."[7] She saw "an older model white pickup truck with an orange stripe" drive away from the house.[8] She was uncertain of whether there were two or three individuals in the truck, and she could not identify the driver.[9] But she identified Currier "as the passenger" after seeing his photo in the lineup.[10] A cigarette butt recovered from the truck also contained Currier's DNA.[11]

Currier was indicted by a single grand jury for breaking and entering, grand larceny, and possession of a firearm by a convicted felon.[12] "Prior to trial, the

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[4] *See* Pet. App. 3a; *see also* Jt. App. 197, 215-16, 237.

[5] Pet. App. 3a-4a; Jt. App. 200.

[6] Pet. App. 3a.

[7] *Id.*

[8] *Id.*

[9] *Id.*; *see also* Jt. App. 250-51.

[10] Pet. App. 3a.

[11] Pet. App. 4a.

[12] *Id.*; *see also* Jt. App. 7-9.

defense and the prosecution agreed to sever the firearm charge from the grand larceny and the breaking and entering charges."[13]

The trial was held in October 2013 on the breaking-and-entering and grand-larceny charges.[14] Currier presented no evidence in defense; instead he argued that the testimony of the Commonwealth's witnesses was inconsistent and unreliable.[15] The jury acquitted Currier on both counts.[16]

Before the second trial, Currier moved to dismiss the firearm charge.[17] His motion was denied, and the trial was held in March 2014. Although the same witnesses testified, the evidence presented to the jury was different given the significant differences in what the Commonwealth had to prove with respect to the firearm charge. Evidence was introduced that Currier was a felon who had been previously convicted of breaking and entering.[18] Moreover, Wood testified about what happened at the river after the safe had been stolen; his testimony at the first trial had generally focused on

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[13] Pet. App. 4a; *see also* Jt. App. 598-99 ("By agreement between the Commonwealth and Mr. Currier, the circuit court severed Mr. Currier's charges. . . .").

[14] *See generally* Jt. App. 32-284 (partial transcripts, jury instructions, and verdict form from the first trial).

[15] *See generally* Jt. App. 240-53 (Currier's closing argument).

[16] Jt. App. 284.

[17] Jt. App. 261, 302.

[18] Jt. App. 480-82.

the events preceding and during the breaking and entering.[19] At trial, Wood testified that Currier was the one who had taken the guns out of the safe and laid them on the bed of the truck.[20] Then, after the money had been removed from the safe, Currier put the guns back inside the safe and the safe was dumped into the river from the bed of the truck.[21]

The jury found Currier guilty of being a felon in possession of a firearm.[22] And the trial court sentenced him to five years' incarceration.[23]

2. Currier appealed his conviction to the Court of Appeals of Virginia, arguing that the issue-preclusion component of the Double Jeopardy Clause barred his trial on the firearm charge.[24] But the Court of Appeals affirmed the trial court's judgment.[25] Without addressing the Commonwealth's argument that Currier could not show that an issue of ultimate fact was necessarily decided in his favor at the earlier trial,[26] the Court of Appeals concluded that the Double Jeopardy Clause did not apply when multiple charges are severed with

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[19] *Compare* Jt. App. 201-02, *with* Jt. App. 417-19.

[20] Pet. App. 4a; Jt. App. 417-19.

[21] Pet. App. 4a; Jt. App. 418-19.

[22] Jt. App. 532.

[23] Pet. App. 5a.

[24] Currier also challenged whether the trial court abused its discretion at the second trial by admitting certain evidence because that evidence was unduly prejudicial. *See* Pet. App. 11a-13a; *see also* Jt. App. 615-17.

[25] Pet. App. 2a.

[26] Pet. App. 10a n.1.

the defendant's consent and for his benefit.[27] The Court of Appeals explained that "the concern that lies at the core of the Double Jeopardy Clause"—"the avoidance of prosecutorial oppression and overreaching through successive trials"—is not present when the defendant consents to severance to avoid any prejudice that may result from trying certain charges together.[28] The Court of Appeals declined to extend *Ashe v. Swenson*[29] and *Yeager v. United States*[30] to hold that the Double Jeopardy Clause's issue-preclusion component bars an agreed trial in a case like this one.[31]

Currier appealed to the Supreme Court of Virginia, which granted his petition but affirmed for the reasons given by the Court of Appeals.[32] Currier filed a timely petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Currier asserts that courts "are openly and intractably divided" over the issue he contends is presented in this case: whether the issue-preclusion component of the Double Jeopardy Clause is waived when a defendant agrees to sever multiple charges for his own

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[27] *See* Pet. App. 5a-6a.

[28] *Id.*; *see also* Pet. App. 9a-10a.

[29] 397 U.S. 436 (1970).

[30] 557 U.S. 110 (2009).

[31] *See* Pet. App. 7a-10a.

[32] Pet. App. 1a.

benefit.[33] But there is no entrenched split of authority on that question warranting this Court's intervention. And even if he were right, this case is a poor vehicle to address the nascent circuit split.

At every appellate level, the Commonwealth has argued that Currier is not entitled to relief regardless of whether he waived the issue-preclusion protection because he has not demonstrated that an issue of ultimate fact was resolved in his favor at the first trial that would bar his second trial. Courts frequently address the "issue of ultimate fact" question first, perhaps recognizing that there is no need to opine on a novel constitutional question if the Double Jeopardy Clause is not implicated at all. Because the Virginia appellate courts declined to address the "issue of ultimate fact" question, no court has resolved it either way in this case. So if certiorari were granted, this Court would need to decide that question in the first instance both as a prudential matter and to award Currier meaningful relief.

Moreover, the Supreme Court of Virginia's decision is correct on the merits. The Double Jeopardy Clause is not meant to serve as a sword for opportunistic defendants to wield against the government. Currier agreed to sever the firearm charge to avoid the prejudice that could result if evidence of his status as a felon was entered into evidence at his trial on the breaking-and-entering and grand-larceny charges. He enjoyed the benefit of that severance; no evidence was

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[33] Pet. 2.

admitted that identified Currier as a felon, and the jury heard no testimony about any prior convictions. Having obtained an acquittal in the breaking-and-entering and grand-larceny trial, Currier wants to use the severance that benefited him to deny the Commonwealth its right to try him on the firearm charge. The Double Jeopardy Clause does not compel that inequitable result.

I. This case is a poor vehicle because resolution of Currier's question presented will not afford him meaningful relief.

As explained below, Currier is wrong that there is a split of authority on the question presented warranting this Court's review. But even if he were right, this case would be a particularly poor vehicle for addressing the issue. As many of this Court's decisions show, it is the rare case where defendants can carry their "burden of demonstrating that the jury necessarily resolved in their favor" "an issue of ultimate fact" that would bar a future prosecution.[34] The Commonwealth has consistently argued in this case that Currier failed to carry his burden of showing that the jury that acquitted him of breaking-and-entering and grand-larceny necessarily found that he had never possessed

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[34] *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356, 363 (2016); *see also Yeager*, 557 U.S. at 125-26; *Schiro v. Farley*, 510 U.S. 222, 232-33 (1994); *Dowling v. United States*, 493 U.S. 342, 352 (1990).

the firearms that were stolen from the Garrisons.[35] No court has resolved that issue, and thus, there is a likelihood that this Court's resolution of the waiver question will not result in meaningful relief.[36]

Ashe instructs that "realism and rationality" are the guides for determining what was necessarily decided in a prior criminal proceeding, and

> [w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[37]

If "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose," then the issue-preclusion component of the Double Jeopardy Clause does not apply.

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[35] *See generally* Br. of Commonwealth, *Currier v. Commonwealth*, No. 160102 (Va. Aug. 12, 2016); Br. of Commonwealth, *Currier v. Commonwealth*, No. 1428-14-2 (Va. Ct. App. May 29, 2015).

[36] *See Schiro*, 510 U.S. at 232 (declining to address whether issue preclusion would bar the use of certain evidence because "Schiro has not met his burden of establishing the factual predicate for the application of the doctrine, if it were applicable, namely, that an 'issue of ultimate fact has one been determined' in his favor").

[37] *Ashe*, 397 U.S. at 444 (citation omitted).

Here, Currier was indicted by a single grand jury for three crimes: breaking and entering; grand larceny; and being a felon in possession of a firearm.[38] The first trial was on the breaking-and-entering and grand-larceny charges, while the second trial was on the firearm charge. Although Currier claims now that the first trial focused on a single fact—whether he was a participant in the crime[39]—he never conceded that that was the sole fact at issue during the trial. He presented no affirmative case, and his closing argument to the jury makes clear that he did not see this as a case of mistaken identity; his argument plainly was that the testimony of the Commonwealth's witnesses was so inconsistent that there was no way to know what happened the day the Garrisons' home was broken into and the safe stolen.[40]

For example, Currier's closing argument highlighted the testimony of the Garrisons' neighbor, and her inability to "tell [the jury] how many people are actually in the truck, two or three."[41] After recounting her inconsistent testimony, Currier argued that, "[w]e really can't tell what happened, you know, how many people were in the truck. She doesn't know if the driver was a man or a woman and she can remember nothing about the driver. . . ."[42]

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[38] Jt. App. 7-9.

[39] *See, e.g.*, Pet. 5.

[40] *See generally* Jt. App. 240-53.

[41] Jt. App. 250.

[42] Jt. App. 250-51.

With respect to Wood's testimony, Currier did not admit that Wood must have had an accomplice and argue that it just was not him; instead, Currier argued that Wood was entirely unbelievable as a witness and that no one could know what had happened that day. In a series of rhetorical questions, Currier asked: "[W]hat do we believe about [Wood] based on everything else? What do we not believe? What's the story? But I submit [that] you can't figure out what it is. You can't try and figure it out. We have absolutely no case that you can put a man who is presumed to be innocent in jail[.]"[43]

Currier's decision to argue his case to the jury based on the inconsistency of the Commonwealth's evidence in general—as opposed to arguing specifically that it was not Currier in the truck—makes it impossible to determine the basis for the jury's verdict.[44] Given the inconsistent testimony about whether there were two or three individuals in the truck, the jury could rationally have decided to acquit Currier because the Commonwealth had not proven beyond a reasonable doubt that Currier had entered the house.[45] The jury

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[43] Jt. App. 252-53.

[44] *E.g.*, *Dowling*, 493 U.S. at 352 (declining to find issue preclusion where "[t]here are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial"); *Schiro*, 510 U.S. at 232-33 (similar).

[45] Jt. App. 276-82.

instructions would support such a conclusion even if the jury believed Currier was in the truck.[46]

Moreover, the elements for being a felon in possession of a firearm are significantly different from breaking and entering and grand larceny.[47] To find Currier guilty of the firearm charge, the jury needed to find only two facts: (1) Currier was a felon; and (2) he possessed a gun.[48] Evidence was admitted at the firearm trial on both elements that was not introduced in the breaking and entering and grand larceny trial because it was not relevant. First, the Commonwealth introduced Currier's prior sentencing order to establish that he was a felon.[49] Second, Wood testified that Currier handled every gun in the safe when it was opened at the river.[50] That evidence alone was sufficient to convict Currier on the firearm charge. Regardless of whether he stole the guns, Currier violated the law when he temporarily possessed them.

Thus, to reach the question presented here and be certain that the decision would afford Currier meaningful relief, this Court must resolve in the first instance whether an issue of ultimate fact was necessarily determined at Currier's first trial that would bar

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[46] *See* Jt. App. 267; *see also* Jt. App. 262 ("[A]fter you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.").

[47] *Compare* Jt. App. 276, 281, *with* Jt. App. 530-31.

[48] Jt. App. 531.

[49] Jt. App. 480-82.

[50] Jt. App. 417-19.

his second trial. The alternative would be to decide a significant constitutional question about waiver and the Double Jeopardy Clause with little guarantee that it would be of practical significance to Currier. In numerous cases, this Court has admonished that "courts should be extremely careful not to issue unnecessary constitutional rulings."[51] Because Currier has not carried his burden of showing that the issue-preclusion protection would apply in this case, the Court should avoid addressing the novel waiver issue.

II. There is no significant split of authorities on the waiver question presented.

Even if this Court were willing to overlook the vehicle problem, Currier is wrong that there is an entrenched circuit split on the waiver issue.[52] To understand why, it is helpful to place this case in context with this Court's Double Jeopardy Clause jurisprudence. The Supreme Court of Virginia's decision fits comfortably within this Court's precedent and the holdings of other courts that have considered the issue.

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[51] *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 143, 161 (1989); *see also United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) ("Our policy of avoiding unnecessary adjudication of constitutional issues therefore counsels against determining senior officials' rights in this case.") (citation omitted); *Marcus v. Search Warrant of Prop.*, 367 U.S. 717, 723 n.9 (1961) ("Because of the result which we reach, it is unnecessary to decide other constitutional questions raised by appellants. . . .").

[52] *See* Pet. 8.

A. The Double Jeopardy Clause contains a limited issue-preclusion component.

The Double Jeopardy Clause of the Fifth Amendment states that: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."[53]

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[54]

This Court has recognized two concerns of the Double Jeopardy Clause: "prosecutorial overreaching" and "finality."[55]

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[53] *Green v. United States*, 355 U.S. 184, 187 (1957).

[54] *Id.* at 187-88.

[55] *Ohio v. Johnson*, 467 U.S. 493, 501 (1984); *see also Crist v. Bretz*, 437 U.S. 28, 33 (1978); *Wade v. Hunter*, 336 U.S. 684, 689 (1949) ("double-jeopardy prohibition is aimed" at "oppressive practices").

Despite the importance of the double-jeopardy prohibition, the Government's inability to appeal acquittals "calls for guarded application of preclusion doctrine in criminal cases."[56] Consequently, the precise facts and circumstances in particular cases are critical to determining if a prosecution is barred by the Double Jeopardy Clause. And whether the defendant consented to the actions that caused the double-jeopardy problem has always been identified as a dispositive fact in the inquiry.

For example, in *United States v. Jorn*, this Court stated that a defendant waives his double-jeopardy protections and could be re-prosecuted for the same offense if he moves for a mistrial, "even if the defendant's motion is necessitated by prosecutorial or judicial error."[57] Although the Court acknowledged the "constitutional policy of finality for the defendant's benefit in federal criminal proceedings," the Court found that that interest dissipates when the defendant consents to the mistrial.[58] And in *Jeffers v. United States*, this Court explained that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the

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[56] *Bravo-Fernandez*, 137 S. Ct. at 358 (citing *Standefer v. United States*, 447 U.S. 10, 22-23 & n.18 (1980)).

[57] 400 U.S. 470, 485 (1971) (plurality op.).

[58] *Id.* at 479, 484-85.

trial court to honor his election."[59] Thus, when a defendant chooses not to insist on his right to have offenses tried together, that "action deprive[s] him of any right that he might have had against consecutive trials."[60] Together, *Jorn* and *Jeffers* show that the double-jeopardy protection belongs to the defendant and that any rights he may possess can be waived based on his choices.[61]

Jorn and *Jeffers* fully apply to a case involving issue preclusion, which is simply one component of the Double Jeopardy Clause.[62] Although the Double Jeopardy Clause was included in the Bill of Rights and discussed at the First Congress,[63] it was only in 1970 in *Ashe* that this Court interpreted the Clause to incorporate issue preclusion.[64]

In *Ashe*, the prosecution tried to prosecute the defendant seriatim for robbing six participants at a poker game.[65] After the defendant was acquitted at the first trial of robbing one participant, the prosecution sought

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[59] 432 U.S. 137, 152 (1977) (plurality op.).

[60] *Id.* at 154.

[61] *See id.* at 154 n.22 ("The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the District Court's attention.").

[62] *See, e.g.*, *Bravo-Fernandez*, 137 S. Ct. at 356.

[63] *See Green*, 355 U.S. at 200-03 (Frankfurter, J., dissenting).

[64] *Bravo-Fernandez*, 137 S. Ct. at 358-59.

[65] 397 U.S. at 437-39.

to prosecute him again for robbing a different participant.[66] This Court found that double jeopardy barred the second prosecution based on issue preclusion. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[67] In *Ashe*, "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not."[68]

Since *Ashe*, this Court has continued to refine and often narrow the scope of the issue-preclusion protection. In *Standefer v. United States*, the Court declined to extend the Double Jeopardy Clause to incorporate "nonmutual collateral estoppel."[69] In that case, the defendant argued that a jury's acquittal of his accomplice in a different trial should bar his prosecution for aiding and abetting the crime his accomplice was acquitted of committing.[70] Although the Court acknowledged that "symmetry of results may be intellectually satisfying, it is not required"; "criminal case[s] involve[] 'competing policy considerations' that outweigh the economy concerns that undergird the estoppel doctrine."[71]

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[66] *See id.* at 439-40.

[67] *Id.* at 443.

[68] *Id.* at 445.

[69] 447 U.S. at 21-26.

[70] *See id.* at 13-14.

[71] *Id.* at 25.

And in *Ohio v. Johnson*, this Court refused to extend issue-preclusion protection to a defendant who had pleaded guilty to lesser-included offenses over the government's objection and then asserted that double jeopardy barred his prosecution on the remaining charges.[72] In addition to pointing out that "the taking of a guilty plea is not the same as an adjudication on the merits after full trial," the Court unequivocally stated that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."[73]

After *Johnson*, this Court has decided several cases that address the effect of inconsistent jury verdicts on issue preclusion. In *United States v. Powell*, the Court held that a defendant could not challenge on issue-preclusion grounds a jury's inconsistent verdict acquitting her of predicate offenses but finding her guilty of other crimes where a predicate offense was an element of the crime.[74] Then, in *Yeager*, the Court concluded that issue preclusion can apply when a jury acquits on some counts but is unable to agree on others; according to the Court, hung counts do not change the potentially preclusive effect of the acquittals.[75] And this past term, in *Bravo-Fernandez v. United States*, the Court held that issue preclusion does not prevent

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[72] 467 U.S. at 500 n.9.

[73] *Id.*

[74] 469 U.S. 57, 69 (1984).

[75] 557 U.S. at 112, 124-26.

the government from retrying a defendant after a jury acquits on some counts and an appellate court reverses the conviction on other counts.[76]

B. Although several courts have reached different conclusions about when the issue-preclusion protection is waived, the issue would benefit from further percolation.

The Supreme Court of Virginia's decision in this case fits comfortably within this Court's Double Jeopardy Clause and issue-preclusion precedent. Currier agreed to have his firearm charge tried separately from his breaking-and-entering and grand-larceny charges.[77] That choice benefited him by avoiding the introduction of prejudicial evidence that he was a felon.[78] The federal courts of appeals that have decided the waiver question have all agreed that the defendant's consent waives any issue-preclusion claim he may have had for the reasons given in *Johnson* and *Jeffers*.[79]

In *United States v. Blyden*, the Third Circuit addressed a case where several defendants were acquitted on firearm charges under Virgin Islands law and

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[76] 137 S. Ct. at 357.

[77] Pet. App. 4a; *see also* Jt. App. 598-99.

[78] Jt. App. 480-82.

[79] *United States v. Blyden*, 930 F.2d 323 (3d Cir. 1991); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221 (4th Cir. 1988).

argued that double jeopardy barred a second trial on certain federal charges.[80] The court found that the defendants had waived their double-jeopardy argument because they had "successfully opposed a consolidated trial on the Virgin Islands and federal charges."[81] And in *United States v. Ashley Transfer & Storage Co.*, the Fourth Circuit found that a double-jeopardy challenge had been waived where the defendants had filed a motion asking the district court "to require the government to elect between prosecuting count I or count II."[82] The district court decided to submit only count I to the jury, which acquitted the defendants.[83] Applying *Johnson*, the Fourth Circuit permitted the defendants to be retried on count II, holding that "[w]here, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy."[84]

Although Currier claims that the New Jersey Supreme Court held in *State v. Chenique-Puey* that a defendant's consent to severance waives his double-jeopardy right to issue preclusion, that court's discussion of waiver was dicta.[85] In *Chenique-Puey*, the court

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[80] 930 F.2d at 327-28.

[81] *Id.* at 328.

[82] 858 F.2d at 223.

[83] *Id.*

[84] *Id.* at 227.

[85] 678 A.2d 694 (N.J. 1996); *see also* Pet. 9. Currier's petition also notes that "[t]wo state intermediate courts have reached the

addressed whether the defendant was entitled to a new trial due to unfair prejudice that resulted from jointly trying charges of "making terroristic threats to kill" and "contempt of a domestic-violence restraining order."[86] The defendant had "moved for a severance of the contempt charge," but the court denied the motion.[87] After concluding that the defendant was entitled to a new trial on the terroristic-threat charge, the court briefly discussed an issue-preclusion concern the government had raised about severance.[88] The court noted that severance "should not create a double-jeopardy problem," because the defendant "should be precluded" from claiming double jeopardy if he moved for the severance.[89] That speculative discussion about a future case, however, was pure dicta.

In contrast to the Third and Fourth Circuits, Currier argues that "three state courts of last resort and one federal court of appeals" have held that a defendant like Currier does not waive his right to issue-preclusion protection by consenting to severance.[90] But he overstates what those courts actually decided.

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same conclusion" as the Supreme Court of Virginia. Pet. 9-10. But those decisions are not from a "state court of last resort" and therefore do not count in determining whether there is a circuit split. *See* Rule 10(b).

[86] *Chenique-Puey*, 678 A.2d at 695.

[87] *Id.* at 696.

[88] *Id.* at 698.

[89] *Id.*

[90] Pet. 11.

The First Circuit did not address that issue in *United States v. Aguilar-Aranceta*.[91] The court's holding was that the defendant "ha[d] failed to present a viable collateral estoppel argument."[92] The basis for the court's holding was that the defendant had not shown that the relevant "issue was actually and necessarily decided by the jury in favor of the defendant."[93] There is no discussion of waiver or severance in the issue-preclusion section of the opinion,[94] and certainly no holding that issue preclusion cannot be waived by consenting to severance of multiple charges.[95]

The three State courts of last resort cited by Currier—Iowa, Florida, and the District of Columbia—have addressed the issue, but their analyses are flawed for various reasons. First, the D.C. Court of Appeals held in *Joya v. United States* that issue preclusion did not bar the defendant's trial on a contributing-to-the-delinquency-of-a-minor charge that had been severed before his first trial.[96] While the court stated that the defendant had not waived his issue-preclusion rights

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[91] 957 F.2d 18 (1st Cir. 1992), *abrogated in part by Yeager*, 557 U.S. 110 (2009).

[92] *Id.* at 20.

[93] *Id.* at 24-25.

[94] The court did hold that the defendant's consent to a mistrial had waived any double-jeopardy claim related to successive trials. *See id.* at 22.

[95] The Louisiana Supreme Court decision in *State v. Blache*, 480 So. 2d 304 (La. 1985), similarly did not address, much less hold, that issue preclusion cannot be waived by consenting to severance. *Id.* at 306.

[96] 53 A.3d 309, 312 (D.C. 2012).

by having the charge severed before his first trial, that conclusion was not dispositive since the court did not find the second trial barred.[97] Because the waiver issue did not control the outcome in the case, the court could have denied the defendant's issue-preclusion claim without opining on the more difficult waiver question.[98] As a result, a future D.C. Court of Appeals panel may consider that discussion dicta and reach a different conclusion.[99]

Second, the Florida Supreme Court's discussion in *Gragg v. State* of the waiver issue is not well-reasoned. Indeed, the court begins its analysis by dismissing the plurality opinion in *Jeffers* as "merely dicta."[100] The court does alternatively find that *Jeffers* is distinguishable because "Jeffers had not been forced to waive one constitutional right in order to assert another" whereas the defendant's "constitutional right to a fair trial" was implicated in Gragg's case.[101] But to the extent *Gragg*'s statement about the constitutional right to a fair trial was premised on federal constitutional

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[97] *See id.* at 316-23.

[98] *See supra* Part I.

[99] *See, e.g., Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 720 n.9 (D.C. 1995) ("This court has repeatedly held that *dictum* in a prior case is not binding precedent. . . ."); *Lee v. United States*, 668 A.2d 822, 828 (D.C. 1995) (analysis "was not necessary for the disposition of the case, and thus constituted 'dictum' not binding on us"). The same is also true of *Commonwealth v. States*, 938 A.2d 1016 (Pa. 2007), where the court mentions issue preclusion and waiver only in a footnote. *See id.* at 1023 & n.8.

[100] *Gragg v. State*, 429 So. 2d 1204, 1207 (Fla. 1983).

[101] *Id.* at 1207-08.

law, the court was wrong. It is not a *per se* violation of a defendant's right to a fair trial to admit evidence of a prior conviction—not even the amicus supporting Currier's petition makes that claim.[102] Thus, the only way *Gragg* can be correct is if it turned on a State constitutional right to a fair trial.[103] And if Florida is providing more expansive fair-trial protections than required by the federal Constitution, its analysis says little about how the waiver issue should be analyzed as a matter of federal constitutional law.[104]

Finally, the Iowa Supreme Court's decision in *State v. Butler* did reach the opposite conclusion as the Virginia Supreme Court,[105] but the decision is internally inconsistent. *Butler* cites *Jeffers* for the point that "[t]he protection embodied in the Double Jeopardy Clause is personal and may be waived by a defendant's voluntary actions and choices."[106] Indeed, the court

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[102] *See Old Chief v. United States*, 519 U.S. 172, 191-92 (1997) (noting the abuse-of-discretion standard ordinarily applied to deciding whether admission of a prior conviction was unduly prejudicial); *see also* Amicus Br. Part II.A (attempting to conflate the undue-prejudice inquiry with a constitutional violation).

[103] *See Gragg*, 429 So. 2d at 1208 (citing *State v. Vazquez*, 419 So. 2d 1088 (Fla. 1982)).

[104] *See Oregon v. Hass*, 420 U.S. 714, 719 (1975); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (stating the Court has not "limit[ed] the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

[105] 505 N.W.2d 806, 810 (Iowa 1993).

[106] *Id.* at 808.

finds that Butler "waived his double jeopardy protection against consecutive trials" based on his motion to sever two charges.[107] But the court refused to extend that waiver "to Butler's collateral estoppel defense" because the defendant "was not attempting to use collateral estoppel as a sword."[108] That conclusion, however, makes little sense when the two criminal counts would have been tried together but for the defendant's severance motion.[109] *Butler* simply fails to recognize that issue preclusion is one component of the double-jeopardy protection, so the same waiver analysis should apply to both claims.

* * *

Although there is a limited split of authority on the question presented, it is neither a pronounced nor a mature split. As Justice Ginsburg has noted, there are "many instances . . . when frontier legal problems are presented" and "diverse opinions from[] state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."[110] "[T]his is exactly the sort of issue that could benefit from further attention" in lower courts.[111] Of the cases Currier references in his petition, most of the

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[107] *Id.*

[108] *Id.* at 810.

[109] *See infra* Part III.

[110] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

[111] *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal).

courts that have issued holdings on the waiver question have agreed with the decision reached by the Supreme Court of Virginia in this case. Only three courts could fairly be said to disagree, and of those three, one's analysis may well be considered dicta in that jurisdiction, another is arguably more protective of a criminal defendant's rights on State constitutional grounds, and the third is internally inconsistent. Given "the absence of a pronounced conflict," this Court "should not rush to answer a novel question" about the Double Jeopardy Clause.[112]

III. The Supreme Court of Virginia correctly concluded that the Double Jeopardy Clause was not implicated when the firearm charge was severed for Currier's benefit and with his consent.

The fact that the Supreme Court of Virginia reached the right result in this case further weighs against this Court granting review. Issue preclusion is one component of the Double Jeopardy Clause, and this Court's precedent has long held that defendants waive their double-jeopardy rights by taking certain actions.[113] Currier plainly waived his double-jeopardy rights in this case by agreeing to sever the firearm

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[112] *Id.*

[113] *See, e.g.*, *Jeffers*, 432 U.S. at 153-54; *Jorn*, 400 U.S. at 484-85.

charge for his benefit.[114] Nothing in this Court's precedent sanctions a rule that would deprive the Commonwealth of its one fair opportunity to try a defendant for illegally possessing a firearm when the only reason the charge was not resolved at an earlier trial was for the defendant's benefit and with his consent.

What the Third Circuit said in *Blyden* perfectly encapsulates Currier's argument:

> The instant case is a classic example of able lawyers pursuing what Roscoe Pound once called "the sporting theory of justice." In essence it is as if one were flipping a coin yelling, "Heads I win; tails you lose."[115]

Here, if the firearm charge had not been severed, there can be little doubt that Currier would have claimed severe prejudice.

Indeed, the amicus supporting Currier's petition would have this Court believe that it would have been akin to constitutional error not to sever the charges in this case.[116] His amicus is wrong—criminal defendants are frequently presented with difficult choices and those difficult choices do not by themselves violate the Constitution.[117] So the waiver issue in this case boils

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[114] *See* Jt. App. 598-99.

[115] *Blyden*, 930 F.2d at 327-28.

[116] *See* Amicus Br. 4-8 (discussing cases that involved defendants being forced to choose between two constitutional rights).

[117] *McGautha v. California*, 402 U.S. 183, 213 (1971) ("The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to

down to whether Currier's decision to risk a separate trial on the firearm charge to avoid relevant but potentially prejudicial evidence about his status as a felon from being introduced at his breaking-and-entering and grand-larceny trial waived any double-jeopardy claim he may have otherwise had for the second trial.

Properly framed, this case falls squarely within *Jeffers* and *Johnson*. *Johnson*'s conclusion controls: "where the State has made no effort to prosecute the charges seriatim" the issue-preclusion component of the Double Jeopardy Clause is not implicated.[118] Severance occurred here by agreement of the parties, not at the behest of the Commonwealth.[119] But even if the issue-preclusion protection could apply in a case like this one, *Jeffers* makes clear that double-jeopardy protections are subject to waiver.[120] Again, Currier agreed to have the charges severed, for his benefit, and so even if the issue-preclusion component of the Double Jeopardy Clause applied here, he waived its protections.

Johnson illustrates why that is the right result. Like the defendant in *Johnson*, Currier has attempted to "use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the

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which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.") (citation omitted).

[118] 467 U.S. at 500 n.9.

[119] Pet. App. 4a; *see also* Jt. App. 598-99.

[120] 432 U.S. at 153-54.

remaining charges."[121] To the extent Currier is "forced to relitigate an allegation a jury has already rejected," it is by his own choice.[122] Currier contends that issue preclusion can never function as a sword, but that conveniently avoids the fact that it was his desire to have the charges severed for his benefit that deprived the Commonwealth of its ability to try him on all three charges at one trial. *Johnson* firmly establishes that the Commonwealth is entitled to its "one full and fair opportunity to convict those who have violated its laws."[123]

In the end, Currier's attempt to differentiate this case from *Johnson* and *Jeffers*, on the theory that issue preclusion is concerned solely with finality as opposed to prosecutorial overreach, falls flat under this Court's precedent.[124] *Jorn* expressly addressed the "constitutional policy of finality for the defendant's benefit in federal criminal proceedings" in deciding whether a defendant had waived his double-jeopardy rights.[125] And notwithstanding the finality interest, *Jorn* still focused on the defendant's actions; the critical fact for deciding whether the defendant had waived the double-jeopardy protection was whether he had agreed to a mistrial.[126]

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[121] *Johnson*, 467 U.S. at 502.

[122] Pet. 22.

[123] *Johnson*, 467 U.S. at 502.

[124] Pet. 22-23.

[125] 400 U.S. at 479 (plurality op.).

[126] *Id.* at 484-85.

The same analysis applies here. Where a defendant agrees to severance, he waives any double-jeopardy claim he may have had. Nothing in the constitutional interest in the finality of criminal judgments exempts defendants from the consequences that flow from their choices. Thus, there is no basis for treating the issue-preclusion protection differently from the other protections afforded by the Double Jeopardy Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

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RECORD AND BRIEFS

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Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Commonwealth acknowledges that state courts of last resort and federal courts of appeals "have reached different conclusions" over whether a defendant who consents to severance of multiple charges loses his right under the Double Jeopardy Clause to the preclusive effect of an acquittal. BIO 18, 21, 25. And the Commonwealth does not dispute that the issue is a recurring one that has important implications for the criminal justice system. Pet. 12-14; *see also* Amicus Br. of NACDL at 1 (issue is one of "critical importance"). The Commonwealth argues, however, that certiorari should be denied because "further percolation" would be useful, this case is a poor vehicle for deciding the issue, and the Virginia Supreme Court's decision is correct.

None of these arguments withstands scrutiny. The split of authority is well developed and ripe for resolution. This case is an ideal vehicle for resolving the conflict. And the Virginia Supreme Court's holding improperly strips criminal defendants of one of the Constitution's most vital safeguards. This Court should grant certiorari.

I. The split of authority over the question presented is well developed and mature.

While recognizing a "split of authority" on the question presented, BIO 24, the Commonwealth advances two arguments as to why that split does not warrant this Court's review. First, the Commonwealth calls for further percolation on the ground that courts that disagree with the Virginia Supreme Court have employed "flawed" reasoning. *Id.* 21. Second, the Commonwealth contends that two other decisions that

the Virginia Court of Appeals grouped into the conflict do not really establish binding precedent on the issue. *Id.* 19-22. Both of these arguments are misguided.

1. The Commonwealth acknowledges that three courts of last resort disagree with how the Virginia Supreme Court and two federal courts of appeals have resolved the question presented. BIO 21, 25. Specifically, the high courts of Iowa, Florida, and the District of Columbia have all held that neither *Jeffers v. United States*, 432 U.S. 137 (1977), nor *Ohio v. Johnson*, 467 U.S. 493 (1984), prevents a defendant who consented to severance from invoking the issue preclusion component of the Double Jeopardy Clause. *See Joya v. United States*, 53 A.3d 309, 316-19 (D.C. 2012); *State v. Butler*, 505 N.W.2d 806, 809-10 (Iowa 1993); *Gragg v. State*, 429 So. 2d 1204, 1206-08 (Fla. 1983), *cert. denied*, 464 U.S. 820 (1983).

That the Commonwealth and other courts believe this interpretation of this Court's precedent to be "flawed" is reason to *grant* certiorari, not deny it. Take, for example, the decision in *Butler*. The Commonwealth pronounces that decision "internally inconsistent" because the Iowa Supreme Court concluded that a defendant who agrees to severance waives his double jeopardy right against successive trials but retains his right to the preclusive effect of an acquittal. BIO 23-24. But that court's differentiation between those two forms of double jeopardy protection actually goes to the heart of the issue here. According to the Iowa Supreme Court (and petitioner), issue preclusion "is an entirely separate claim" from an attempt to avoid multiple trials and "mandates a separate analysis"—one that ultimately forecloses waiver in this situation. *Butler*, 505 N.W.2d

at 808-09; *see also* Pet. 17-20. The Commonwealth, on the other hand, insists that "the same waiver analysis should apply to both claims." BIO 24. Only this Court can resolve who has the better reading of this Court's case law.

The Commonwealth also asserts that the D.C. Court of Appeals' double jeopardy analysis in *Joya* should be discounted because the court "did not find the second trial barred." BIO 22. The court, however, engaged in a detailed analysis of the double jeopardy issue and held that "the government [was] estopped" at the second trial from seeking to prove the factual allegations the jury in the first trial necessarily rejected. *Joya*, 53 A.3d at 321. This analysis and conferral of constitutional relief directly contravenes the Virginia Supreme Court's decision here. It also confirms that the disagreement over how to interpret *Jeffers* and *Johnson* has been fully ventilated and is ripe for resolution.

2. Even if the split of authority were—as the Commonwealth maintains—only three-to-three, that would be more than sufficient to warrant this Court's intervention. But the conflict in reality is four-to-four.

The Commonwealth asserts that the First Circuit's decision in *United States v. Aguilar-Aranceta*, 957 F.2d 18 (1st Cir. 1992), *cert. denied*, 506 U.S. 834 (1992), "did not address" the question presented. BIO 21. It is true that *Aguilar-Aranceta* did not deal directly with severance. But the First Circuit squarely held that the "collateral estoppel effect" of an acquittal is "separate from" the question whether consenting to a subsequent trial "waive[s]" the protection against multiple prosecutions for the same offense. 957 F.2d at 22-23. The First Circuit also

concluded that a "defendant's consent" to a second trial does *not* waive the former protection. *Id.* As several courts in the conflict have recognized, this analysis and holding necessarily mean that defendants in the First Circuit retain their right to the issue-preclusive effect of an acquittal even if they consent to severance. *See* Pet. App. 11a n.2; *Joya*, 53 A.3d at 319 & n.20; *Butler*, 505 N.W.2d at 810.

The Commonwealth also incorrectly dismisses the discussion in *State v. Chenique-Puey*, 678 A.2d 694 (N.J. 1996), of the double jeopardy question presented as "dicta," BIO 19. The New Jersey Supreme Court required the charges in that case to be severed in part because it believed that a defendant who consents to severance is "precluded from then asserting double jeopardy or collateral estoppel bars to the subsequent prosecution." *Chenique-Puey*, 678 A.2d at 698 (citing *Jeffers*). This portion of the opinion thus constitutes part of the case's holding, not mere dicta. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

II. This case presents an ideal vehicle for resolving the conflict.

The Commonwealth argues this case is an unsuitable vehicle for resolving the conflict over the question presented because (1) "this Court must resolve in the first instance whether an issue of ultimate fact was necessarily determined at Currier's first trial that would bar his second trial" and (2) petitioner cannot make such a showing. BIO 11-12. Neither contention is correct.

1. The Commonwealth is doubly wrong in asserting that granting certiorari would require this Court determine whether the Double Jeopardy Clause precludes trying petitioner on the felon-in-possession charge.

First, there is no reason why this Court would need to apply the issue-preclusion test to the facts here. To the contrary, this Court's customary practice is to decide whether a constitutional protection applies and, if so, to remand to allow lower courts to apply those protections in the first instance. *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869-71 (2017). This Court did exactly that in *Yeager v. United States*, 557 U.S. 110 (2009). It held that the Double Jeopardy Clause entitled the defendant to assert issue preclusion and remanded for the lower courts to decide the "factual dispute" regarding which charges (if any) the jury's acquittal precluded the Government from pursuing further. *Id.* at 125-26.

The Court could—and should—follow that same course here. As lower courts have recognized, the question whether the issue-preclusion doctrine applies is logically antecedent to whether any particular defendant is entitled to relief on the facts. *See, e.g.*, *Joya*, 53 A.3d at 316 (waiver question should be addressed "before" factual issues); *Commonwealth v. Wallace*, 602 A.2d 345, 347-50 (Pa. Super. 1992) (following same progression). This Court need not detain itself with the latter issue.

Second, even as to the factual component of petitioner's double jeopardy claim, the Commonwealth improperly conflates the issue whether petitioner's conviction should be reversed with whether the

Double Jeopardy Clause ultimately "bars" a new trial. *See Joya*, 53 A.3d at 321 (distinguishing one from the other). To obtain "meaningful" relief on appeal (*see* BIO 8), petitioner does not need to show that the Double Jeopardy Clause forecloses a trial on the felon-in-possession charge. He needs to show only that the trial that produced his conviction failed to respect the preclusive effect of his acquittal at the first trial. Under the issue-preclusion doctrine, a conviction must be reversed, regardless of the permissibility of a new trial, whenever the prosecution "relitigat[ed] any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119.

Here, the prosecution did just that. The jury at petitioner's first trial determined, at the very least, that petitioner did not participate in the home-break-in and theft of the safe. Yet at the second trial, the Commonwealth again sought to prove—primarily through the testimony of Bradley Wood—that petitioner participated in those very actions. *See, e.g.*, Jt. App. 403-07 (Wood's testimony: "Me and Mr. Currier . . . went into the house," "loaded the safe up and took the safe away"); *id.* 450 (closing argument: petitioner "engaged in these acts" with Wood). Even now, the Commonwealth insists that "Currier and Bradley Wood broke into the home of Paul and Brenda Garrison and stole [the] safe." BIO 1. The Commonwealth has taken this position because the safe was so heavy that it could not "be moved [by] one person." Jt. App. 455. Thus, as the Commonwealth explained to the trial judge, "[i]t's impossible for the jury to understand how we get a safe in the river without the—and how we connect Mr. Currier to the safe in the river without that prior, that prior involvement there in the house." *Id.* 313.

In light of this evidence and argumentation in petitioner's second prosecution, it does not matter whether—as the Commonwealth now maintains, *see* BIO 10-11—the jury at the first trial could rationally have concluded that petitioner waited in the truck while Wood and some other, unnamed accomplice removed the safe from the Garrison residence. The Commonwealth did not advance any such theory at the second trial. Rather, it sought to demonstrate exactly what it failed to prove in the first trial—namely, that petitioner acted in complete concert with Wood. If petitioner is entitled to the preclusive effect of the first jury's finding that he did *not* steal the safe with Wood, then his conviction from the second trial must be reversed.

2. Even if there were reason to assess not just whether petitioner's conviction should be reversed but whether the Double Jeopardy Clause bars a new trial altogether, petitioner will almost certainly be able to make that showing on remand. The Commonwealth has never argued that anyone besides Wood and petitioner participated in the crimes. Nor has it ever presented any theory why petitioner would have waited in Wood's truck while Wood and someone else stole the safe. To the contrary, as the trial court put it, the Commonwealth's allegation regarding "the guns being accessed by Mr. Currier" has always depended upon its proving "the larceny charge." Jt. App. 488. "[T]he connection between the larceny, the guns, and the safe act as one final essential element." *Id.*

It would be quite an abrupt shift for the Commonwealth to change course now—particularly when any new factual theory would contradict the story of its central witness, Mr. Wood. And it is hard

to believe the state courts would allow such a shift, even if the Commonwealth attempted it.

III. The Virginia Supreme Court's decision is incorrect.

The depth of conflicting authority here, along with the importance of the question presented, calls for this Court's intervention regardless of whether the Virginia Supreme Court reached the correct result. That said, the Commonwealth's arguments on the merits only confirm the need for review.

The Commonwealth does not seriously dispute that the Double Jeopardy Clause's bar against relitigating issues decided against the prosecution applies "irrespective of the good faith of the State in bringing successive prosecutions." *Harris v. Washington*, 404 U.S. 55, 56-57 (1971) (per curiam). Nor could it. This Court has held that issue preclusion applies where state law requires severance of the charges, *see Turner v. Arkansas*, 407 U.S. 366, 367, 370 (1972) (per curiam), and where a hung jury thwarts the prosecution's attempt to litigate all charges in a single proceeding, *see Yeager*, 557 U.S. 118-19. No prosecutorial bad faith is present in either instance. So it is likewise irrelevant whether "prosecutorial overreaching" occurred here.

That leaves the Commonwealth's contention that a defendant nevertheless "waives" his right to the preclusive effect of an acquittal whenever, as here, he agrees to severance. BIO 25-29. It is true that a defendant waives (more accurately, forfeits) a constitutional right when he takes an action that is incompatible with that right. *See* Pet. 17-18. *Jeffers* and *Johnson* apply this general principle to the double jeopardy protection against successive prosecutions: If

a defendant seeks severance, he loses the right to complain about the fact of a second trial. *See Jeffers*, 432 U.S. at 142, 153-54; *Johnson*, 467 U.S. at 502; *see also United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion) (same when defendant seeks a mistrial).

The Commonwealth, however, ignores that this case does not involve the protection against successive prosecutions. Instead, as the Petition stresses, this case involves the distinct protection against relitigating issues previously decided against the prosecution. *See* Pet. 18-19. And there is nothing logically inconsistent in agreeing to severance and still insisting upon the preclusive effect of an acquittal. *Id.* That being so, there can be no waiver here.

Even if the waiver analysis here permitted some balancing of the equities, the outcome could be no different. All agree that petitioner could not have objected to severance without suffering "the undue prejudice that would occur upon mention of [petitioner's] felonious past to a jury." Pet. App. 9a; *see also Michelson v. United States*, 335 U.S. 469, 475-76 (1948). The Commonwealth counters that applying issue preclusion in this context would "deprive [it] of its one fair opportunity" to prove all of its allegations. BIO 26. But as petitioner has explained, the issue-preclusion doctrine operates only after the prosecution has had an opportunity to prove an allegation and failed to do so. *See* Pet. 21-22. And even then, the prosecution remains free to pursue remaining charges on any theory (supported by sufficient evidence) that it has not already litigated and lost. *See, e.g.*, *Joya*, 53 A.3d at 321-23. The equities, therefore, do not reasonably allow any finding of waiver.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

MICHAEL NELSON CURRIER,

Petitioner,

v.

VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

As the only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. To this end, NACDL files numerous *amicus curiae* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of critical importance to NACDL's members and the fair administration of justice: whether a criminal defendant effectively waives the protections of the Double Jeopardy Clause by consenting to severance of claims in order to avoid a prejudicial trial. Review is warranted to resolve the

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief and consented to its filing.

acknowledged conflict on this issue, and to provide needed guidance to criminal defense lawyers and their clients, prosecutors, and lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

A jury acquitted petitioner Michael Currier of burglarizing a home and stealing a safe that contained cash and guns, finding that Currier was not at the scene of the crime. A second jury at a second trial later convicted Currier on a felon-in-possession-of-a-firearm charge on the theory that he broke into the home and stole the safe, briefly handling the guns inside it in order to remove the cash, before throwing the safe and guns into a nearby river.

No one could reasonably dispute that, ordinarily, the second trial for felon-in-possession would be prohibited by the Double Jeopardy Clause's issue preclusion component, which forbids the prosecution from re-litigating issues decided against it in a prior trial. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). After all, if Currier didn't break into the home and steal the safe, he couldn't possess the guns inside it. But the decision below, in conflict with decisions from numerous other courts, held that Currier waived his double jeopardy rights by consenting to severance of the felon-in-possession charge from the burglary and theft charges. *See* Pet. App. 10a. The charges were severed under a Virginia law providing that, to avoid unduly prejudicing defendants, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) (en banc).

Petitioner aptly explains the multitude of reasons that this case warrants review. *Amicus* submits this brief to provide an additional reason the Court should intervene: the decision below is at odds with decades of this Court's jurisprudence refusing to find waiver where criminal defendants are put to an unfair Hobson's choice of sacrificing one important right in order to preserve another.

That is precisely what occurred here. Currier faced the choice of enduring either (1) a single trial at which evidence of his prior felony conviction relevant to the felon-in-possession charge would unduly prejudice him with respect to the burglary and theft charges, or (2) sequential trials in which the prosecution at a second trial could re-litigate issues it lost at the first—exactly the type of "dry run" the Double Jeopardy Clause aims to prevent. *Ashe*, 397 U.S. at 447.

This Court should grant certiorari to confirm that a choice between either an unfair trial or waiving one's right not to "be twice put in jeopardy of life or limb," U.S. Const. amend. V, is no choice at all—much less a voluntary waiver.

ARGUMENT

I. NO WAIVER OCCURS WHEN A CRIMINAL DEFENDANT IS FORCED TO SACRIFICE ONE IMPORTANT RIGHT TO SECURE ANOTHER

The decision below and others like it have held that, by choosing severance of charges to avoid a prejudicial trial, criminal defendants effectively waive the Double Jeopardy Clause's protection against a second trial on the same issues. *See, e.g.*, Pet. App. 10a (severance occurred "with the defendant's consent and for his benefit"); *United States v. Ashley Transfer & Storage*

Co., 858 F.2d 221, 227 (4th Cir. 1988) ("Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy."). But that view rests on the broken premise that the defendants exercised a legitimate choice. Sacrificing one important right to preserve another is no "choice" at all.

A. This Court Has Long Refused to Find Waiver Where a Defendant Is Put to a Hobson's Choice

1. Nearly fifty years ago, this Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). There, the lower court held that the defendant's testimony at a suppression hearing could later be used against him at trial. This Court reversed, holding that the defendant could not be put to the choice "either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* Notably, this Court rejected the lower court's conclusion that the defendant's "voluntary" choice to obtain the "benefit" of testifying to protect his Fourth Amendment rights waived his right against self-incrimination. *Id.* at 393-94.

Applying a similar rationale, this Court rejected a law that required an officer of a political party to either waive his right against self-incrimination and testify in response to a subpoena or else be barred from political office, thereby forgoing his First Amendment right to "participate in private, voluntary political associations." *Lefkowitz v. Cunningham*, 431 U.S.

801, 808 (1977). Citing *Simmons*, the Court explained that the law unfairly "require[d] [the officer] to forfeit one constitutionally protected right as the price for exercising another." *Id.* at 807-08.

Beyond situations involving an unfair choice between two constitutional rights, this Court has refused to find voluntary waiver when the "choice" was to forgo a constitutional right or face some serious hardship. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Court found it impermissible to require public employees either to answer questions by criminal investigators, or else lose their jobs. "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice . . . ." *Id.* at 497. This Court thus found statements made to investigators under such circumstances inadmissible, rejecting the argument that the defendants' voluntary choice to answer questions constituted a "waiver": "Where the choice is between the rock and the whirlpool, duress is inherent in deciding to waive one or the other." *Id.* at 498 (internal quotation marks omitted). In short, "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Id.* at 500; *accord Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968) (holding that police officer appearing before grand jury could not be put to "Hobson's choice" of waiving immunity or losing job).

Similarly, the Court held that defendants could not be forced to "choose" between either contesting guilt at trial or avoiding a death penalty charge. *United States v. Jackson*, 390 U.S. 570, 581-82 (1968). The option to either risk one's life or exercise the right to a trial by jury was not a valid "choice"—the law "impose[d] an impermissible burden upon the exercise of a constitutional right." *Id.* at 582-83.

2. Relying on this Court's precedents, federal courts of appeals likewise have rejected putting defendants to a Hobson's choice of sacrificing one important right to preserve another.

For instance, where a "defendant has disclosed truthful information to demonstrate financial inability and obtain counsel under the Sixth Amendment, that information may not thereafter be admitted against him at trial on the issue of guilt." *United States v. Aguirre*, 605 F.3d 351, 358 (6th Cir. 2010). Citing this Court's decision in *Simmons*, the Sixth Circuit held that admitting such information at trial would erroneously "force a defendant to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self incrimination." *Id.*

The Third Circuit reached the same conclusion, holding that a district court erred "when it admitted the testimony and the financial affidavit, and thus created a tension between [the defendant's] Fifth and Sixth Amendment rights. It in effect conditioned the free exercise of one constitutional right upon waiver of the other." *United States v. Pavelko*, 992 F.2d 32, 34 (3d Cir. 1993). As the court explained, "the Supreme Court has held in a similar context that placing an accused in such a dilemma and creating this tension between the free exercise of rights is constitutional error." *Id.* (discussing *Simmons*, 390 U.S. at 377).

The same rule has been applied in multiple other contexts. The Eleventh Circuit held that a defendant could not be forced to choose between either waiving his right to testify at trial or forgoing legal representation. *United States v. Scott*, 909 F.2d 488, 493 (11th Cir. 1990). Relying on *Simmons*, the court explained that "[t]o advise [the defendant] that he could be precluded from testifying . . . or could proceed pro se

impermissibly forced [him] to choose between two constitutionally protected rights." *Id.*; *accord id.* ("In this case, the trial judge impermissibly forced defendant to choose between two constitutional rights: the right to testify and the right to counsel.").

It is likewise impermissible to offer a defendant access to a free trial transcript for appeal only if he chooses to be represented by court-appointed appellate counsel. Citing *Simmons*, the Sixth Circuit held that imposing this condition would, "in effect, require[] an indigent defendant to surrender one constitutional right in order to exercise another"—*i.e.*, to "surrender his Sixth Amendment right to self-representation in order to exercise his Fourteenth Amendment right to the basic tools of adequate appellate review." *Greene v. Brigano*, 123 F.3d 917, 921 (6th Cir. 1997).

Nor can the prosecution use a defendant's presence at trial to satisfy an element of a crime requiring proof that the defendant was "found in" the United States. *United States v. Herrera-Ochoa*, 245 F.3d 495, 499-500 (5th Cir. 2001). Otherwise, the Fifth Circuit concluded, "a criminal defendant would be forced to choose between his Sixth Amendment right to be present at trial or his Fifth Amendment due process right that the government prove each and every element of the offense charged against him beyond a reasonable doubt." *Id.* "The Supreme Court has deemed such a choice, in which 'one constitutional right should have to be surrendered in order to assert another,' 'intolerable.'" *Id.* at 500 (quoting *Simmons*, 390 U.S. at 394).

Finding that "[t]he reasoning in *Simmons* is compelling," the Third Circuit held that a defendant cannot "be required, as the cost of litigating what he and his counsel believe to be a valid fifth amendment double jeopardy claim, to waive the fifth amendment privilege

against self-incrimination in a later trial." *United States v. Inmon*, 568 F.2d 326, 333 (3d Cir. 1977). "If he testifies in the pretrial double jeopardy hearing, his testimony may not be used against him either on the conspiracy count, if the district court rejects his claim, or on the substantive counts." *Id.*

It is similarly erroneous to preclude a defendant charged with attempted reentry after deportation from submitting evidence in his defense unless he testifies. *United States v. Hernandez*, 504 F. App'x 647, 649 (9th Cir. 2013) (unpublished). Relying on *Simmons*, the Ninth Circuit held that the defendant could not be put to the choice of either waiving his "constitutional right to present a defense or forfeiting his constitutional right not to testify." *Id.*

And a defendant cannot be put to the "choice" either to "waive his right to a speedy trial and receive more time for his counsel to prepare, or . . . proceed immediately to trial that same afternoon." *Hunt v. Mitchell*, 261 F.3d 575, 584 (6th Cir. 2001). The Sixth Circuit found this situation akin to the "intolerable" choice rejected in *Simmons*. *Id.* (quoting *Simmons*, 390 U.S. at 394). "While [the defendant's] statutory right to a speedy trial under Ohio law may not equate precisely to his constitutional right to a speedy trial under the Sixth Amendment, the element of coerced choice decried by the Court in *Simmons* is nevertheless present here." *Id.* (citation omitted).

B. *Jeffers* Indicates That Sacrificing Double Jeopardy Rights to Avoid a Prejudicial Trial Is an Unfair Hobson's Choice

While not every hard choice a criminal defendant faces is invalid, the principles above apply with full force where "compelling the election impairs to an

appreciable extent any of the policies behind the rights involved." *McGautha v. California*, 402 U.S. 183, 213 (1971), *vacated sub nom., Crampton v. Ohio*, 408 U.S. 941 (1972).

A plurality of this Court in fact has found the principles above implicated in the present context. In *Jeffers v. United States*, 432 U.S. 137 (1977), the defendant successfully opposed the government's motion for a consolidated trial on two indictments charging greater and lesser offenses. *Id.* at 143. After the jury convicted the defendant of the lesser offense, he sought to bar the prosecution from trying him for the greater offense in a second trial. *Id.* at 144. A plurality of this Court concluded that, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding," there was no double jeopardy violation because the defendant "elect[ed]" to have the two offenses tried separately. *Id.* at 152. The Court reasoned in part that a single trial on lesser and greater offenses "could have taken place without undue prejudice to petitioner's Sixth Amendment right to a fair trial." *Id.* at 153.

Critically, however, the plurality noted that the outcome might be different—and that *Simmons* would be implicated—had the defendant sought severance to avoid undue prejudice:

> Petitioner argues that a finding of waiver is inconsistent with the decision in *Simmons v. United States*, . . . where the Court held that a defendant could not be required to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert an arguably valid Fourth Amendment claim. In petitioner's case, however, the alleged Hobson's choice between asserting the

> Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy claim is illusory. Had petitioner asked for a . . . severance from the other defendants, the case might be different. In that event, he would have given the court an opportunity to ensure that prejudicial evidence relating only to other defendants would not have been introduced in his trial. . . . No such motion, however, was made. Under the circumstances of this case, therefore, no dilemma akin to that in *Simmons* arose.

Id. at 153 n.21. As explained below, Currier faced precisely such a "dilemma" in the present case.

II. A DEFENDANT DOES NOT WAIVE DOUBLE JEOPARDY RIGHTS BY CHOOSING SEVERANCE TO AVOID AN UNFAIR TRIAL

Under the decision below, a defendant charged with felon-in-possession and other offenses faces the sort of Hobson's choice that this Court has held cannot constitute a valid waiver. On the one hand, if the defendant chooses a single trial of all charges, the jury would learn of his prior conviction, unduly prejudicing him with respect to the substantive charges. On the other hand, if the defendant chooses to sever the felon-in-possession charge, he waives his double jeopardy rights if the first jury acquits. In either event, the defendant must sacrifice one important right to preserve the other. Neither can constitute a valid waiver.

A. Evidence of a Prior Felony Is Unduly Prejudicial

1. This Court "has long recognized . . . [that] the introduction of evidence of a defendant's prior crimes

risks significant prejudice." *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). This principle derives from a "common-law tradition" in which a "defendant's prior trouble with the law . . . [or] specific criminal acts . . . [were] said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

The Federal Rules of Evidence incorporate protections against such prejudice. Rule 403 permits exclusion of evidence if its probative value is substantially outweighed by a danger of unfair prejudice. For criminal defendants, "unfair prejudice . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (internal quotation marks omitted). One of the evils that Rule 403 seeks to eliminate is the use of propensity evidence to convict a defendant. As this Court has observed, "[a]lthough . . . propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *Id.* at 181 (alteration in original) (internal quotation marks omitted).

Other rules likewise seek to guard against the inherent prejudice from a jury hearing about a defendant's prior crimes. Rule 404(b) specifically excludes evidence of a "crime, wrong, or other act" offered "to prove a person's character" and thereby the person's likelihood of committing other crimes. Fed. R. Evid. 404(b)(1).

The Federal Rules of Criminal Procedure employ safeguards based on the same principles. While Rule

8(a) authorizes joinder of multiple charges in a single indictment, Rule 14 allows courts to sever charges if sufficient prejudice would result from a single trial.

2. These rules are backed up by decades of studies showing the inherent prejudice that occurs when a jury is informed of a defendant's prior convictions. *See* Kathryn Stanchi & Deirdre Bowen, *This Is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?*, 89 Wash. L. Rev. 901, 911 & n.36 (2014) (collecting studies). "Most studies show that admission of a defendant's prior conviction leads to more guilty verdicts in criminal trials." *Id.* at 911.

Studies generally have shown that "[t]he evidence against a defendant with a prior record appears stronger to [a] jury" because jurors use past convictions "to develop propensity judgments and other generally negative evaluations of a defendant." Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking a Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1361 (2009).

For example, a study of 160 mock jurors found that disclosure of a defendant's prior conviction substantially increased the number of jurors who reached a guilty verdict after reading the facts of the case, witness and defendant testimony, and jury instructions. *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & Hum. Behav. 37, 39, 43 (1985). Mock jurors were also twice as likely to convict an alleged auto thief if he had a prior conviction for a dissimilar crime, and even more likely to convict when they learned that the defendant had a prior auto theft conviction. *Id.* at 43 tbl.2. These results hold true for defendants charged

with murder. *Id.* Overall, mock jurors elected to convict defendants with prior criminal records at significantly higher rates than defendants who lacked any criminal history. *Id.* at 41, 43 tbl.2.

In another study of 105 participants given a summary of a real bank-robbery trial transcript, 40% of the subjects voted to convict when told of the defendant's prior conviction, versus only 17% of subjects who were unaware of the prior conviction. *See* Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & Hum. Behav. 67, 72 (1995). Subjects who learned of the prior conviction also viewed the defendant as "less credible and more dangerous." *Id.* at 74.

Analyses of actual trials generally have shown similar results. One study evaluating juror questionnaires distributed following trials in multiple jurisdictions found that jurors were more likely to convict after learning of a prior conviction when the jurors otherwise found the evidence weak; the effect of learning of the prior conviction was not pronounced in cases where jurors felt that the evidence was already strong. *See* Eisenberg and Hans, *supra*, at 1386. Thus, in cases with weaker evidence of guilt, "[t]he prior record effectively leverage[d] the existing evidence over the threshold needed to support conviction." *Id.* at 1385. While some have questioned the full extent of such prejudice, *see* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. Crim. L. & Criminology 493, 497-500 (2011), the consensus remains that informing a jury of a defendant's prior conviction is unduly prejudicial. *See, e.g.*, 1 Edward J. Imwinkelried, Uncharged Misconduct Evi-

dence § 1.2 (2016) (summarizing consensus in literature); Richard Lempert, *The American Jury System: A Synthetic Overview*, 90 Chi.-Kent L. Rev. 825, 833 n.19 (2015) (similar).

Studies also indicate that a judge's limiting instructions intended to restrict the jury's consideration of a prior conviction not only have little beneficial effect, but may actually "backfire," increasing the prejudice to the defendant by calling the jury's attention to his prior criminal record. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407, 425-30 (2013); *see also* Stanchi & Bowen, *supra*, at 911 n.36 (collecting studies). "[L]imiting instructions are not a reliable method for eliminating the negative impact of criminal records." Eisenberg & Hans, *supra*, at 1361. "With few exceptions, empirical research has repeatedly demonstrated that . . . limiting instructions are unsuccessful at controlling jurors' cognitive processes." Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psychol., Pub. Pol'y, & L. 677, 686 (2000).

Moreover, although many studies do not distinguish among prior convictions, research suggests that both the nature of the prior offense and its similarity to the present charge negatively impact jurors' impressions of a defendant. *See* Eisenberg & Hans, *supra*, at 1361. As this Court has observed, "[w]here a prior conviction was for a gun crime or one similar to other charges in a pending case[,] the risk of unfair prejudice would be especially obvious." *Old Chief*, 519 U.S. at 185.

3. Studies reporting the prejudicial effect of prior conviction evidence are consistent with common sense,

as well as the experiences of felons outside the judicial system. Stigma against individuals like Currier based on a prior felony conviction manifests in a variety of contexts well beyond the courtroom doors. In employment, a prior felony conviction makes securing a second interview or a job offer substantially more difficult. *See* Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Annals Am. Acad. Pol. & Soc. Sci. 195, 200 (2009). Empirical inquiries have revealed a pronounced negative impact of a prior conviction on employment outcomes, and have anecdotally revealed that many employers use criminal records as a screening mechanism for applicants. *See* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 955-56 (2003). In post-secondary education, many colleges and universities now collect and examine applicants' criminal histories as a component of the admissions process, thereby erecting an additional barrier to advancement for individuals with prior convictions. *See* Matthew W. Pierce et al., *The Use of Criminal History Information in College Admissions Decisions*, 13 J. Sch. Violence 359, 360 (2014).

More broadly, studies reveal deeply negative public attitudes towards those previously incarcerated. *See* Candalyn B. Rade et al., *A Meta-Analysis of Public Attitudes Toward Ex-Offenders*, 43 Crim. Just. & Behav. 1260, 1260-63 (2016). Stigma and prejudice against prior offenders result in public desire to maintain social distance and erect barriers to accessing community resources and housing. *Id.* at 1260-61. These impacts are more acute and pronounced for felons than misdemeanants. *Id.* at 1262.

In light of the deeply rooted prejudices that juries and society at large harbor against felons, "[a] defendant's interest in avoiding introduction of prior crimes evidence [at trial] is clear and compelling." *United States v. Dockery*, 955 F.2d 50, 53 (D.C. Cir. 1992). When a defendant is tried on felon-in-possession and other charges simultaneously, there is an obvious risk that the defendant will suffer the "unfair prejudice" of the jury "generalizing [the] defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief*, 519 U.S. at 180-81.

Indeed, "[a]ll of the Circuit Courts seem to agree that trying a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges." *United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996); *see also United States v. Miles*, 96 F.3d 491, 495 (D.C. Cir. 1996) ("We have long recognized that where a felon-in-possession charge is joined with other counts, the defendant may be unduly prejudiced with respect to the other counts by the introduction of prior crimes evidence . . . ."). But under the decision below, a defendant must forgo severance and stand trial for felon-in-possession and other charges together, or else waive his double jeopardy protection against re-litigation of issues that the prosecution already lost in an initial trial.

B. Allowing Prosecutors to Re-litigate Issues They Lost Is Antithetical to the Double Jeopardy Clause

While a single trial on felon-in-possession and other charges is unduly prejudicial to the defendant, so too is the prospect of allowing the prosecution, at a second trial, to re-litigate issues that it lost at the first.

1. The "underlying idea" of the Double Jeopardy Clause is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). "Permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm [the] Government with a potent instrument of oppression." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Importantly, the issue preclusion component of the Double Jeopardy Clause "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009).

Issue preclusion secures the finality and sanctity of acquittals, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen*, 430 U.S. at 571. "[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment [of acquittal]." *United States v. Scott*, 437 U.S. 82, 92 (1978). Verdicts of acquittals accordingly are entitled to "special weight," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982), and "particular significance," *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (internal quotation marks omitted).

Issue preclusion also prevents the unfairness of allowing the prosecution a practice run of trying a defendant more than once. "[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *Id.* at 128. Indeed, the Court in *Ashe* forcefully rejected prosecutors' admitted use of a first trial as a "dry run" for an acquitted defendant's subsequent prosecution on charges stemming from the same criminal episode. 397 U.S. at 447. The second jury in *Ashe* convicted the defendant after hearing testimony that was "substantially stronger" on a key issue than the prosecution had offered at the first trial, which ended in acquittal. *Id.* at 440. Such an outcome is "precisely what the constitutional guarantee forbids." *Id.* at 447. The prohibition against affording the government "the proverbial 'second bite at the apple'" is "central to the objective of the [Clause's] prohibition against successive trials." *Burks v. United States*, 437 U.S. 1, 11, 17 (1978).

Here, Currier's second trial presented all of the problems with sequential prosecutions that the Double Jeopardy Clause aims to prevent. *See* Pet. 6-7. After two prosecution witnesses floundered in the first trial, prosecutors returned at the second trial with more polished witnesses whose testimony sought to prove that Currier was at the scene of the crime. After having DNA evidence (a cigarette butt found in the co-defendant's truck) excluded from the first trial for failure to turn it over to the defense in time, the prosecution fixed the procedural violation and used the DNA to convict Currier in the second trial. The DNA evidence was weak because Currier and his co-defendant were friends, and thus Currier might have ridden in the truck and smoked the cigarette at any time, not just the day of the crime. But bolstered by

the enhanced witness testimony, prosecutors pointed to the DNA evidence as proof that Currier was at the scene. All of this was *after* the first jury had already determined that Currier was not at the scene and played no role in the theft. Providing the prosecution an opportunity to refine its case after an acquittal is "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447.

2. While defendants need not establish prosecutorial abuse to invoke issue preclusion under *Ashe*, *see* Pet. 22-24, the Court in *Ashe* recognized that issue preclusion protects against prosecutorial overreaching. Unlike in English common law and early American practice, in which "[a] single course of criminal conduct was likely to yield but a single offense," the higher volume of overlapping but highly specific modern criminal statutes makes it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction," rendering "the potential for unfair and abusive reprosecutions . . . far more pronounced." *Ashe*, 397 U.S. at 445 n.10.

This concern is particularly acute here, where the felon-in-possession charge was premised on the theory that petitioner briefly handled the guns inside the safe in order to remove the cash. Pet. App. 293. There was no allegation that petitioner "possessed" the guns for any purpose other than moving them aside to get to the money in the safe. To the contrary, the prosecution's theory was that petitioner discarded the safe and guns in a river after removing the cash. The felon-in-possession charge against Currier was aggressive and tenuous at best. But it allowed the prosecution to try petitioner twice for the same alleged

criminal episode. The decision below thus could encourage similar overcharging.

In sum, while severing the felon-in-possession charge avoids the risk of jury prejudice from the prior conviction, the option to endure a second trial and "run the gantlet a second time" is no more favorable. *Ashe*, 397 U.S. at 446 (internal quotation marks omitted). Under this Court's precedents, putting a defendant to the choice of waiving one right or the other is "intolerable." *Simmons*, 390 U.S. at 394.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL NELSON CURRIER,

Petitioner,

v.

VIRGINIA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: May 8, 2017
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IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE, VIRGINIA

Commonwealth v. Michael Currier
Case No. 12-613

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
12/03/2012	Indictment by grand jury.
06/27/2013	Felon-in-possession charge severed from breaking-and-entering and grand larceny charges.
09/17/2013	Trial on breaking-and-entering and grand larceny charges commenced; Court announced mistrial for failure to seat a jury.
10/28/2013	Trial on breaking-and-entering and grand larceny charges commenced.
10/29/2013	Trial concluded; jury found defendant not guilty.
11/20/2013	Defendant filed motion to preclude evidence by collateral estoppel.
11/21/2013	Felon-in-possession charge set for trial.
12/17/2013	Hearing on defendant's motion to preclude evidence by collateral estoppel; motion denied.
03/11/2014	Trial on felon-in-possession charge; jury found defendant guilty.
07/25/2014	Defendant filed motion to set aside verdict based on collateral estoppel.
07/29/2014	Hearing on defendant's motion to set aside verdict; motion denied.

IN THE COURT OF APPEALS OF VIRGINIA

Michael Nelson Currier v. Commonwealth of Virginia
Record No. 1428-14-2

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
07/30/2014	Notice of appeal filed.
03/23/2015	Order granting appeal.
12/15/2015	Decision issued.

IN THE SUPREME COURT OF VIRGINIA

Michael Nelson Currier v. Commonwealth of Virginia

Record No. 160102

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
06/06/2016	Order granting appeal.
12/08/2016	Decision issued.

[VA S. CT JA: 7]

Virginia:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE
December 3, 2012 TERM

THE GRAND JURY CHARGES THAT, in the County of Albemarle **MICHAEL N. CURRIER** did unlawfully and feloniously

On or about March 7, 2012, break and enter or enter and conceal himself in the daytime, or enter without breaking in the nighttime, the dwelling of Paul Garrison, II, with the intent to commit larceny, assault and battery or any felony other than murder, rape, robbery, or arson in violation of §§ 18.2-91; 18.2-10 of the Code of Virginia (1950) as amended.

VCC CODE: BUR-2213-F9

Docket Number:
Grand Jury Witness: William R. Underwood
Albemarle County Police Department

A True Bill /s/ [Illegible]
Foreman of the Grand Jury

Not A True Bill _____
Foreman of the Grand Jury

not guilty plea
3-19-13

12-611
12-6

[VA S. CT JA:8]

Virginia:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE
December 3, 2012 TERM

THE GRAND JURY CHARGES THAT, in the County of Albemarle **MICHAEL N. CURRIER** did unlawfully and feloniously

On or about March 7, 2012, steal currency or property, having a value of two hundred dollars ($200) or more, belonging to Paul Garrison, II, in violation of § 18.2-95 of the Code of Virginia (1950) as amended.

VCC CODE: LAR-2359-F9

Docket Number:
Grand Jury Witness: William R. Underwood
Albemarle County Police Department

A True Bill /s/ [Illegible]
Foreman of the Grand Jury

Not A True Bill _____
Foreman of the Grand Jury

not guilty plea
3-19-13

12-612

[VA S. CT JA:9]

Virginia:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

December 3, 2012 TERM

THE GRAND JURY CHARGES THAT, in the County of Albemarle **MICHAEL N. CURRIER** did unlawfully and feloniously

On or about March 7, 2012, knowingly and intentionally possess or transport a pistol, revolver, or other firearm having previously been convicted of a violent felony as defined in § 17.1-805 whether such conviction or adjudication occurred under the laws of this Commonwealth, or any other state, the District of Columbia, the United States or any territory thereof, in violation of §§ 18.2-308.2; 18.2-10 of the Code of Virginia (1950) as amended.

VCC CODE: WPN-5296-F6

Docket Number:
Grand Jury Witness: William R. Underwood
Albemarle County Police Department

A True Bill /s/ [Illegible]
Foreman of the Grand Jury

Not A True Bill _____
Foreman of the Grand Jury

not guilty plea
3-11-2014

12-613

COURT REPORTER'S TRANSCRIPT
October 28, 2013

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the October 28, 2013, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

TESTIMONY OF PAUL GARRISON, II

* * *

[DIRECT EXAMINATION]

[By: Mr. Quatrara]

[67:8]*

Q Okay. And then, across the road, who lives across the road from you?

A Cindy Sandridge.

Q Okay. Now, let's draw your attention to the date of March the 7th, do you recall—start with the morning of that date, do you recall what did you first thing in the morning when you got up on March the 7th?

---

* All references to the record are cited from the Virginia Court of Appeals Joint Appendix, with the exception of those identified as "VA S. CT JA," which are taken from the Virginia Supreme Court Joint Appendix.

A I got up, got ready, and went to work about 6:45.

* * *

[78:18]

Q Okay. Now, what, if *any,* valuables did you keep in that safe?

A I had twenty (20) guns in the safe, it was approximately seventy one thousand dollars ($71,000) in cash in that safe.

* * *

[82:7]

Q What kind of guns were they that were in your safe?

A It was some high powered rifles, shotguns, pistols.

Q Do you like to hunt?

A Yes, sir.

Q Most are primarily hunting weapons?

A Yes, sir.

Q Okay. Now as this case went on, you were ultimately, through the efforts of Albemarle County Police, you were able to ultimately recover some of these firearms, is that correct?

A Yes, sir.

Q What kind of condition were you able to recover them in?

A They were in pretty rough shape. They were full of rust, they'd been thrown in a river, and I've gotten some of them where you can use them, some of them not. They were in bad shape.

* * *

COURT REPORTER'S TRANSCRIPT
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TESTIMONY OF WILLIAM UNDERWOOD

* * *

[DIRECT EXAMINATION]

[By: Mr. Quatrara]

[116:10]

Q What, if anything, did Ms. Sandridge tell you?

A Ms. Sandridge told me she heard a banging noise across the street, sounded like somebody beating on metal. She had stepped—she originally thought that it was the homeowners that were at—had gotten home. She knew they had been gone earlier in the evening. She heard a vehicle start up, when she did she stepped out on her front porch to observe, and she saw a white 1970's model Ford pickup leaving the driveway. She stated that she saw two occupants inside the vehicle, and that the individual that was in

the passenger seat looked at her, as the truck drove by, that she felt like she could identify that person.

[117:5]

Q Now, did there come a time afterwards, in preparation for trial, in which Ms. Sandridge gave you a different piece of information with regard to the number of individuals that she believed was in the truck?

A There is, on the date that this photograph was taken, when we were at her house, she advised us that she thought it was three persons in the truck.

* * *

[125:10]

Q What did you learn about how the safe was located, how it was found?

A The fisherman had been fishing on the bank and observed something in the water. He wasn't sure what it was, but he thought it was a safe, and he called the Nelson County Sheriff's Department and reported it.

* * *

[126:19]

Q Can you give the folks on the jury just a brief overview of the items that you ultimately found in the safe?

A Yes, we found—there were numerous firearms, long guns, rifles, shotguns, in the safe. There were a lot of bank envelopes, some of them contained cash, some of them were empty. There were vehicle titles indicating that the title for that vehicle belonged to the Garrisons. There [127] were some precious metals, some coins, just various items of value inside

there. There were a lot of personal—obituaries from family members who had passed away, different items that were used to verify that the safe belonged to the Garrisons.

* * *

CROSS-EXAMINATION

[By: Mr. Barnhardt]

[184:17]

Q Thank you, officer. Now, a lot of different aspects here, so focusing on your initial conversation with Ms. Sandridge, who is the eye witness at the scene where the theft took place. She told you that there were two suspects in the car, is that right?

A On the day that I initially responded she stated two.

[185]

Q Okay. And on subsequent conversations did that number change?

A It did.

Q When did it change?

A On the September date when we were taking photographs and we spoke with her.

* * *

[189:16]

Q Okay. Now for Mr. Bradley Wood's—he turned himself in, is that right?

A He did.

Q And you interrogated him for—after he turned himself in, you interrogated Bradley Wood about the crime?

A I did.

Q And wasn't it your belief that Mr. Wood was not being honest with you during that interrogation?

A During parts of it, yes.

[190]

Q During parts that he was—wasn't he changing his story back and forth while he was talking to you?

A He was.

* * *

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Commonwealth of Virginia v. Michael Nelson Currier

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This is a partial transcript of the proceedings in the above-named matter conducted on this date.

TESTIMONY OF CYNTHIA SANDRIDGE

* * *

[DIRECT EXAMINATION]

[By: J. Addison Barnhardt]

[205:17]

Q Did you see any people in the truck?

A Yes, sir.

Q Okay. How many people did you see in the truck?

A I didn't—I couldn't see the driver, but I knew that there was someone driving, and I think there was two other people in the truck.

* * *

[213:16]

Q * * * Okay. Now, so you testified that when you heard the truck start up and you actually walked outside to see what was going on?

A I went to the window and then I went to the porch — on the porch, yes, sir.

Q So when you went to the window, was that when you actually saw the truck drive by?

A Uh-uh (indicating no). When I went to the window, the truck was actually coming up the driveway, the way [214] the driveway is coming up. And then I just walked out on the porch, just opened the door and walked out on the porch.

Q Just to get a better look?

A Uh-huh (indicating yes).

Q But you didn't think anything unusual, right?

A No, sir.

Q Okay. And when the car was coming up, it — this was, you said it was about in the middle of the day around 2:00 p.m.?

A It was around — between — I'm saying around 2:00, I don't remember, but —

Q Yeah, sometime around then?

A Yeah, it was in the afternoon.

Q It was a sunny day?

A Yes, sir.

Q And so, when the truck was coming up the driveway, there were glares coming off the truck, right?

A Yes, sir.

Q And there are shadows that you couldn't see?

A Yes, sir.

Q And so, now we saw the picture — can we bring the picture up again? Thank you. And so, this is a view from your porch, is that right?

A Yes, sir.

[215]

Q And where the person is in that photo, that's where the truck was coming up, right?

A Yeah, it was more going over to the side, like going up Sugar Hollow.

Q Okay.

A It was making the turn, like going up Sugar Hollow. So, he — it wasn't like in the middle of the driveway, it was over to the edge of the driveway.

Q The truck wasn't in the middle of the driveway or —

A Not — no, it came out and just — it wasn't like in the middle, it was kind of off to the side.

Q So it would be — looking at this photo, just from our angle —

A But the truck came out —

Q You put the person a little bit over to the right —

A Yeah.

Q — and that's where the truck would be —

A Uh-huh (indicating yes).

Q — when it was coming up, and then it turned?

A Uh-huh (indicating yes). And it was moving real slow.

[216]

Q It was moving slow? And you don't know — well, just to be clear, you didn't know if the person driving the truck was male or female, right?

A No

Q Or — and you originally told the officers that it was two people in there, isn't that right?

A I said two to three people in the truck.

Q So you weren't even sure if there were two or three?

A Well, I'm sure it was three. I mean, I know it was three. You could just — yeah, it was three.

Q But at the time you talked to the officers, you didn't know it was three?

A I told them it was between two and three people in the truck, and nobody on the back of the truck. If they were on the back of the truck, they were laying down.

Q And did you take down the license plate number?

A No, sir.

Q Just to be clear, you didn't suspect anything of these?

A No, sir, I did not — didn't suspect anything.

Q Okay. Now, there's a driver and —well, so the passenger, you couldn't tell — could you tell if it was a male or female?

[217]

A Uh-huh (indicating yes).

Q In the middle seat?

A Oh, in the middle seat, no, sir.

Q No, you couldn't.

A Just on the passenger side at the window.

Q Okay. And isn't it true that when you described that person to the officers, you said that it was a man with light brown hair and who was small in stature?

A In the middle of the truck is what I said, not on the passenger side, though. I said it was a light brown person — light brown hair driving the truck, it looked like. But I didn't say anything about the passenger.

Q So you couldn't describe the passenger at all?

A Yeah, I did. I picked the passenger out.

Q Well, I know, but when you were actually questioned about who the passenger was, what kind of description did you give the officers?

A I don't think I gave a description, really. I don't remember. I don't remember, but I —

Q So did you — is that because you didn't know, at all, what the person looked like?

A He's confusing me, I don't know what you mean.

Q I'm sorry, I don't mean to confuse you.

[218]

MR. QUATRARA: Judge, I'm going to object to the form. The witness is obviously confused by the question.

THE COURT: Well, I think he was just starting to rephrase the question.

MR. QUATRARA: Thank you.

Q I'm sorry, I don't mean to confuse you. I know — my question is, the passenger, did you ever give a description of what the passenger — the only person that you could see in there, and know that — even if it was a male or female —

A I said that —

Q — did you describe any of their features?

A I said the person that was driving was a smaller person. When they come out of the driveway, you could see. It was a small frame person, is what I said.

Q You don't — you didn't give any hair color at all?

A I don't remember, maybe light brown for the driver. I don't remember.

Q So you described the driver, but you didn't describe the passenger?

A No.

Q Is that right?

A Yeah.

[219]

Q Okay.

A I guess, I don't even remember now.

Q You said that there as an orange stripe on the truck?

A Yes, sir.

Q Was that a stripe that was across the body of the truck?

A Yes, sir, it went down the side.

Q So that when it was turning you could see an orange stripe across the whole side?

A Uh-huh (indicating yes).

Q There wasn't a stripe that was on the hood? You know, sometimes they have those stripes that come up on the hood?

A Uh-uh (indicating no). It was on the side of the truck.

Q Okay. Can we — can you show the jury about how — you said it was about that thick?

A Yes, just a little orange stripe running down the side of the truck.

Q And it — did it go from the front to the back the entire way, like across the —

A Yeah.

Q — door?

[220]

THE COURT: Mr. Barnhardt, I'm sorry, but you said that thick. We need a number for the record.

Q That —

THE COURT: You said the stripe was that thick.

Q Oh, the stripe was about three inches.

MR. QUATRARA: I think the witness' — I'm not in the business of —

A Yeah, I—I don't think—

MR. QUATRARA: I think her hand is smaller, I would object to the characterization of three inches, but I guess.

Q Two to three inches?

A Yeah.

Q Large enough for you to see?

A Yeah, large enough for me to see.

Q Okay. When the truck passed you by, could you — what did you see of the passenger? Did you see a profile? Or did you see a face turned towards you?

A He looked at me, he was looking over our way, over at my house when they come out. But the truck, like I said, the truck came out of the driveway really slow. And it—when it went past—when it pulled out of the driveway and was going down the road, it was moving really slow. It [221] wasn't like it, like, flew out of there or went really fast or anything like that.

Q Now you say that the driver had light brown hair, is that right?

A Yeah.

Q When did you get a look at the driver?

A I didn't see the driver's features at all.

Q I'm confused, I thought—you just said that you could at least see the driver had light brown hair, is that right?

A That's what I was assuming, yeah. That's what I told the cops. I was assuming the driver had light brown hair and a small frame.

Q And when did you see that?

A When they were pulling out of the driveway, just looking through the window of the truck, that's all I saw.

Q So, is it fair to say that you saw the driver, but you didn't see the passenger?

A No.

Q Okay.

A I didn't see the driver good at all.

[222]

Q And when the passenger looked at you, you didn't recognize any sort of facial features at all? I just — just to be clear.

A I just remember the face that I saw.

* * *

COURT REPORTER'S TRANSCRIPT
October 28, 2013

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the October 28, 2013, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

TESTIMONY OF BRADLEY WOOD

* * *

[225:12]

THE COURT: Thank you, Mr. Quatrara. So we can bring Bradley Wood in, please.

(Bradley Wood enters the courtroom at this time)

THE COURT: Good afternoon, Mr. Wood. I'm going to actually swear you in in front of the jury, but there are a couple of things that I needed to admonish you about. Number one is you cannot speak, at all, about Mr. Currier having any prior record, being arrested, serving any jail time, because it could potentially cause a mistrial in this case if the jury has any hint that he has a prior record or that he's been incarcerated. * * *

[DIRECT EXAMINATION]

[By: Matthew J. Quatrara]

[230:17]

Q So you made the decision to go ahead and commit this breaking and entering and larceny offense, correct?

A Yes, sir.

Q Michael Currier do it with you?

A Yes, sir.

Q You see him here in court?

A Yes, sir.

Q Can you point him out for the Judge?

[231]

A (Points to defendant)

Q If the record would please reflect he's identified the defendant, Mr. Currier.

THE COURT: The record will so reflect.

Q Did anybody else do it with you?

A I guess what you call someone being there is the same thing as doing it. So—

Q Who else was there?

A Samantha—Samantha Wood.

Q Samantha Wood is who?

A My wife.

Q What kind of vehicle did you use to do it?

A '78 Ford.

Q What color was it?

A White.

Q What time of day or night did you do it?

A Daytime, it was around eleven o'clock.

Q Okay. So during the day?

A During the day.

Q What did you do with the safe?

A I can't tell you exactly where in Nelson County it was taken to, but it was dumped in a river.

Q Did you participate in the dumping of it?

A Yes, sir.

[232]

Q Okay. What did you do with the guns that were in the safe?

A Left them in the safe.

Q Why?

A Because convicted felons, didn't want no parts of it.

Q Okay. What about the money, what happened with the money?

A It's gone, I guess.

Q Did you use any of it?

A I couldn't tell you how much I used of it. It wasn't much, because I, like I say, I turned myself, it wasn't long after I was wanted, I turned myself in.

Q Who'd you leave it with?

A I left my portion with my wife.

Q Did you know, or have reason to know, whether or not your wife was involved in a relationship with Mr. Currier outside of your marriage to her at this time?

A No, sir. I didn't have a clue.

Q But you're aware of that now, correct?

A Yeah, I've heard allegations of it.

Q But at the time—

A No.

Q —you didn't know?

[233]

A I was not aware of it.

Q Did you find out about it since you've been incarcerated?

A Probably last month, a little over a month.

Q Did Dennis Wood do it with you?

A He was the one kind of set it up.

Q Okay.

A Told—he kind of went into detail when they would be there, when they wouldn't be.

Q Was he present whenever it happened?

A No.

Q How did you get the safe out of the house?

A Carried it, slid it across the floor and carried it.

Q Who did that part?

A Both of us.

Q You and Mr. Currier?

A Me and Mr. Currier.

Q What was Samantha's role?

A Sitting in the vehicle. Pretty much being a watch-out.

Q When you left the residence, were you aware of whether anybody had seen you?

A No, I was not.

[234]

Q And you said that Dennis set the whole thing up, correct?

A Yes, sir.

Q Gave you the idea of schedule and all that kind of stuff—

A Told me when they'd be home, when they wouldn't be home.

Q Okay. Did you tell the police before that Dennis was actually present and there?

A Yes, I did.

Q Why did you do that? Why did you tell—that was not true, correct?

A That was not true.

Q All right. Why did you tell the police that?

A I really can't say, to be honest with you. I guess, just mad at the point that I that I had heard he told on me.

Q Because Dennis had implicated you in an unrelated—

A Yeah.

Q —or a different larceny event?

A Something totally different, yeah.

* * *

[CROSS-EXAMINATION]

[By: J. Addison Barnhardt]

[242:12]

Q Now, you were interrogated by the police a couple times, is that right?

A Yes, sir.

Q And that was Detective Underwood who interrogated you?

A Yes, sir.

Q And you weren't truthful with him when you were being interrogated, isn't that right?

A Not at first, no, sir.

Q Okay. For instance, you said that when your—during the interrogation, that it wasn't your truck that was used—

A Yes, sir.

[243]

Q —during the—and that wasn't true, right?

A Yes, sir.

Q You said, originally—

A By law, it's still not my truck. By law it's in my wife's name.

Q Well you told Detective Underwood that it was Mr. Currier's truck, isn't that right?

A Yes, sir, originally.

Q Okay. But it was your truck?

A Yes, sir.

Q Does your truck have an orange stripe that goes across from the hood to the back?

A It has, like, a little red pinstripe.

Q A little red pinstripe?

A Yeah.

Q That goes from—all the way across the entire truck?

A Yeah.

Q Okay, and about how thick is that—

A Smaller than my thumb, I mean, my pinky.

Q Oh, okay.

A It's real small.

Q So less than an inch?

A Yeah.

[244]

Q Okay. Now, you said that—you originally said that you were in the passenger seat of the truck when it was leaving, right?

A Yes, sir.

Q And—but that wasn't true, was it?

A No, sir.

Q You were driving the truck?

A Yes, sir.

Q Okay. Now, you told the detectives at the beginning that you actually never went to the river to get rid of the safe, isn't that right?

A I might have, I—I said two different stories, I believe, at the beginning, and then I changed and actually said the real story.

Q But you just said that you had—originally, when you talked to the detective, you said you heard tell that they went to the river, but you weren't there.

A Yes.

Q Isn't that right?

A Yeah.

Q But you were actually at the river—

A Yes.

Q —isn't that true?

A Yes, sir.

[245]

Q So, originally you said you were just the lookout?

A Yes, sir.

Q Isn't that right?

A Uh-huh (indicating yes) .

Q But you weren't the look-out, you were actually inside getting—stealing the safe—

A Yes, sir.

Q —or trying to open the safe? And you originally said there was only twenty thousand dollars ($20,000) that was stolen—or about twenty thousand dollars ($20,000), isn't that right?

A I think so.

Q But that was a lie, too, wasn't it?

A Yes, sir.

Q There was more like seventy thousand dollars ($70,000) that was stolen?

A I believe so.

Q And you originally said—well, you said today, that this was all Dennis' idea to begin with?

A He came up with the concept of where some money was, where that kind of money was. He had said it was like a hundred grand.

[246]

Q But you're saying—are you saying today that Dennis wasn't actually there?

A No, he wasn't there.

Q But you said—well, you told the police officers that he was there, wasn't that right?

A In the original story, yes.

Q Didn't you say that when you were driving up in the truck that he was actually sitting in the middle of the truck?

A Yes, sir.

Q And you said that Samantha Lawhorne, your wife, wasn't there? That's what you told the police officers, right?

A Yes. That's the original story.

Q But today—today you're saying that she was there? Was she in the truck with you?

A Yes.

* * *

[248:1]

Q Now, you and Mr. Currier, you hung out from time to time, is that right?

A We were pretty close.

Q But you had a couple falling outs, didn't you?

A Never, never.

Q You never had a falling out—

A Never.

Q —over buying wood?

A Never.

Q Didn't you get upset with Mr. Currier — I'm sorry, let me say that differently. Didn't Mr. Currier get upset with you because you were reselling the firewood that he was selling to you?

A No, because half the time I would call him for firewood, he would go with me and we'd split the money together. He'd help me unload it.

Q You all had a falling out over your wife, didn't you?

A Never.

Q You didn't—you don't remember seeing Mr. Currier's number on your wife's phone?

A Never.

Q That didn't happen?

A Never.

[249]

Q You didn't call Mr. Currier up?

A Never, I haven't found out that until about last month, that he supposedly had a[n] affair with my wife.

Q Okay. You knew the safe was at your aunt and uncle's house, didn't you?

A I knew about it when I was told about it.

Q I don't have any further questions.

* * *

COURT REPORTER'S TRANSCRIPT
October 29, 2013

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the October 29, 2013, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

CLOSING ARGUMENT OF PLAINTIFF'S COUNSEL, MATTHEW J. QUATRARA

* * *

[254:17]

MR. QUATRARA: Because whether or not these crimes were committed, whether or not Paul Garrison, II and Brenda Garrison were victims of a breaking and entering and grand larceny at their home on March the 7th, 2012 is not in dispute. Mr. Barnhardt is not going to get up in his argument and say, this crime didn't happen. Indeed, indeed, in his opening statement, if you remember back to his opening statement, he readily acknowledged that they did, so instructions fifteen (15) through twenty (20) aren't in dispute. These crimes absolutely [255] happened. What else isn't really in dispute in the case? It's really not in dispute that more than one person committed

this offense, right? You've got jury instructions six (6) through eight (8). It is not — 6 through 8 that say a principal in the first degree is the person who actually commits the crime, and a person is considered present at the scene of the crime if he was in place to render assistance in the commission of the crime and there's a concert of action with the resulting crime of its incidental probable consequences. That's a lot of abstract terminology, and it's also terminology you don't need to consider. You can take jury instructions 6 through 8 and set those off to the side, and why is that? Because it's not in dispute that more than one person committed this offense. How do we know that? What's the evidence that more than one person committed the offense? Whether or not you find it's Michael Currier who is one of the other people or not, how do we know that? Remember, think back to what Mr. Garrison told you. He was the very first witness that testified. What did he tell you about that safe that we know got removed from the house? He told you the safe by itself weighed over seven hundred (700) pounds and that it took he and four other men to get it into the house in the first place. Now you saw Bradley Wood. By the way, we know Bradley Wood did this, right? We know he's one of the people that's [256] involved. How do we know that? He told us so, number one. Number two, you have a plea agreement in front of you as part of your evidence that is an official court document that says he did. Number three, Detective Underwood gave you all the evidence that he did, so we know Bradley Wood is one of those people and you've seen him. He hardly looks like an NFL defensive lineman capable of moving a seven hundred (700) pound safe on his own, so it's not reasonable to think that the crime was

committed by Mr. Wood alone, so instruction 6 through 8 you can discard because we know that someone else was there and actually helping, physically helping remove that safe. It couldn't be done with one person. So we know the crimes were committed; that's not in dispute. We know the crimes were committed by more than one person; that's not in dispute. What is in dispute? What is in dispute? Really only one issue and one issue alone. Was the defendant, Michael Currier, one of those people that was involved in the offense? Was he one of those people that was involved in the offense? Now, how do we go about making that determination? Let me start with instruction #1. It's a long instruction and I'm going to read it to you the most important part of it for purposes of going through the algorithm that I'd like for you to follow and consider the following and that's this. You may not arbitrarily disregard believable testimony of a witness, instruction #1. Said another [257] way, if a witness— if a witness testifies and you believe that person, that testimony is part of the evidentiary algorithm, part of the equation that under the instructions you must follow to reach a finding of whether or not Mr. Currier committed the offense, and I would suggest to you that there are three possible independent algorithms, three independent algorithms by which you can reach that finding, by which the government's case is made. Algorithm number one — victim testimony plus Officer Underwood testimony equals Mr. Currier guilty beyond a reasonable doubt. How do we get there? Well, Mr. and Mrs. Garrison tell you the crimes happened, correct? That's not in dispute. Their testimony is uncontroverted. We had this house; it got broken into; all our stuff got taken. Officer

Underwood's testimony, and this is irrespective of any other witness, this is just victims plus Officer Underwood. Officer Underwood's testimony, I investigate this case. I respond to the house. I find, remember this material that Officer Underwood showed you in his hand that he found at the house? I find this material on the floor of the bedroom where the safe was kept. I do some additional investigation and I locate a truck and in the truck what do I find? Some more material. You be the judge. You saw what it looks like. I would suggest to you that a reasonable person would find that stuff to be awfully similar thus indicating what? That [258] the truck is involved in the offense, all from the testimony of Officer Underwood, nobody else. The truck is involved in the offense. Officer Underwood then administers the photographic lineup. Officer Underwood administers the photographic lineup to Cynthia Sandridge and it's his observation, his present sense impression of how Ms. Sandridge reacts to the lineup that serves as the evidence you need to establish that Michael Currier is in that truck that we know is connected to the offense. Why should we find that testimony of Officer Underwood believable? Remember, you shall not disregard any believable testimony, so what makes Officer Underwood's testimony believable with regard to what he observes from Ms. Sandridge when she does the photo lineup? What makes that believable? Think about the way Officer Underwood told you he administered that photo lineup, but more importantly than how he administered the photo lineup, remember and think about the way Ms. Sandridge responded. She goes through the entire photo lineup once. She gives number one a maybe, number two a no, number

three a no, number four who is Mr. Currier, a maybe, number five a no, number six a no, number seven a no, number eight a maybe. She doesn't immediately focus on number four in a way that might give you some pause about her credibility through Officer Underwood and say, that's the guy, that's the guy, that's the guy. No. She's much more thoughtful, much more [259] pensive about it, and we know that not only from Officer Underwood's testimony but the notes that came into evidence that are before you made contemporaneous to the administration of the lineup which serve to corroborate what he verbally tells you in his testimony. Now, think about the second time we go through it. The second time go through it we rule out everybody else, and when we get to number four, what does Officer Underwood tell you Ms. Sandridge says? It's in the notes; you'll see it. That's the guy in the passenger seat. That's the guy in the passenger's seat. She doesn't embellish; she doesn't inflate. She gives a measured account of who that person was. So we know, then, based on that reaction through Officer Underwood, that that's believable testimony. Put another way, we know that because it doesn't come out in a different way that it's not unbelievable, said another way. So, that's sort of method number one, victim plus Underwood equals conviction of Mr. Currier beyond a reasonable doubt, independent of any other witness. Method number two, algorithm number two to consider. Again, independent of algorithm number one. Victim plus Cynthia Sandridge herself equals Mr. Currier is guilty. Remember, the victims tell you, of course, again, they had their house broken into, they had their stuff stolen, this really happened to them. That's not in dispute. * * *

COURT REPORTER'S TRANSCRIPT
October 29, 2013

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the October 29, 2013, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

CLOSING ARGUMENT OF DEFENSE COUNSEL, J. ADDISON BARNHARDT

* * *

[267:8]

MR. BARNHARDT: Thank you-all very much for your service, for being so attentive over a whole day yesterday and now, at least a half-a-day of listening to us talk more, but this is it. You did a lot of shuffling back and forth yesterday. The next time you're going to be doing that you're going to be shuffling into the jury room and you're going to be reaching a verdict. So, you heard a lot of evidence, there's a lot to consider, there's a long story here. It lasts over a year-and-a-half, so we need to consider that. Before we get there I want to go over some of the legal principles that Mr. Quatrara didn't quite go over that I would like you to hear. Now, we say these terms a lot and we hear them

on TV a lot, reasonable doubt, beyond a reasonable doubt, presumption of innocence, that he's innocent until proven guilty, and we say them so much and we're so used to those terms that we kind of can gloss over them a little bit and not really get into exactly what they mean but this is the standard, these are the standards by which you-all [268] have to judge Mr. Currier today and to judge the Commonwealth and their case. These are the rules that you have to follow, so my job is to keep letting you know how important these rules are and really how deep they go in their importance, and so presumed innocent, that's kind of the easier one to understand, that he's an innocent—you have to view Mr. Currier today, just like all of us, an innocent man, that he's not guilty just because he's here and the Commonwealth has a case and the police officers have a theory that he was the one who did this.

* * *

[273:17]

[MR. BARNHARDT]: So, we have the detective and his investigation, Detective Underwood. He had a tough set of facts to work with. He didn't have any fingerprints. He had lots of deception from people that were giving him different stories. He had multiple suspects but he finds Bradley Wood and we heard him testify about all the evidence. The material in the truck. This is material that was found at the scene and then found in Bradley Wood's truck, his wife's [274] truck, but I'm going to call it Bradley Wood's truck at Bradley Wood's house, nothing to do with Mr. Currier. He finds Bradley Wood and that's the evidence that we have. He had great evidence for why Bradley Wood committed this crime and then he said Bradley Wood

lied, lied, lied, changed his story over and over again. He said, and I quote, you can't trust, I couldn't trust Bradley Wood and I don't think you-all can trust him either. I think you can trust, I'm willing to trust the fact that he did commit this crime, but that's about it.

* * *

[277:19]

MR. BARNHARDT: So, the defense's position is that the testimony is not very credible. We have — she testifies there are either two or three people in the car. This is a very important case for Mr. Currier and about what she actually saw, and she can't tell you how many people are actually in the truck, two or three. What does that mean? It Means we don't know. We really can't tell what happened, [278] you know, how many people were in the truck. She doesn't know if the driver was a man or a woman and she can remember nothing about the driver, but then she says yesterday I can't remember any of his features, but the driver, the driver was the one who had light brown hair. Light brown hair. We saw that Mr. Currier does not have light brown hair. We see Bradley Wood did have light brown hair. But then she says, the man looked at her but she can't describe anything about that man. This is our eyewitness in the case, somebody that was an eyewitness that can't describe anything about the man that looked at her and we saw, we saw the photo. It was, you know, of Detective Underwood whose, you know, about that tall on the screen, you know, from her porch. Yet, she goes to a photo lineup and with people, and you'll see the pictures, you'll take them back, with all of these men that look very similar she's able to say, that one. I couldn't see him at the time, but

now, eight days later, I know it's that one, I'm certain about it. So, did she see him on the news? Did she see him on the Internet? We know that the media release was before her actual photo lineup, I'm not sure, we don't know, or was she given a description by the Garrisons when they were trying to figure out who it was, the suspect that stole, that might have stolen all this money from us? We're not sure, we don't have evidence about that, but it's a legitimate question. [279] She knew what truck to describe. She couldn't see anything about the man's face that looked at her, but she could see an orange stripe across the truck that she says was about that big but then the owner or the truck or the person who drove the truck said it's smaller than a pinkie. It's a pinstripe, so she knows there's a pinstripe on the truck and I know it's there and she said it was orange. Mr. Wood might have said it was red but, again, this raises questions. She is able to describe this truck in detail and able to describe the driver as perhaps fitting the description maybe of Bradley Wood but nothing about who was in the passenger seat. I'm sure you-all wanted to come in here and have somebody give an unbiased account of what happened, this is what I saw, that's it, these are the facts, I'm giving them to you straight, and I just don't think we—it doesn't seem clear that that was the case from yesterday. So, what are we left with? We're left with Bradley Wood. Bradley Wood is a relative of the victim so he knows them, and it's tempting to try and figure out from all of his testimony from what he said to the cops and what he said on the stand yesterday for you-all to go back there and say, okay, let's sit down and figure out what do we believe about him based on everything else? What do we not believe?

What's the story? But I submit you can't figure out what it is. You can't try and figure it out. We have absolutely no [280] idea. He cannot tell the truth. That was the first thing that he said when I started cross-examining him. You heard that from Detective Underwood who said I never believed him and you saw him. He had no shame about his lies. He just yep, I lied, yep, sure. That was about it. He said, and I quote, hard to keep the story straight. Another quote, maybe it's the first story I told you. Then what about all of his inconsistencies? He turns himself into the police. He said Michael Currier did this, Michael Currier's truck, Michael Currier was the driver and then he admitted, yeah, those were all lies. Well, he admitted that it wasn't Michael Currier's truck they used and Michael Currier wasn't the driver. He says I was the driver, it was my truck. He said it was Dennis's idea and then he admitted, though, it wasn't, Dennis wasn't there. He said he was the lookout at one point. He said he wasn't at the river but he wasn't a lookout. He was at the river when he disposed, lies, lies, lies. He lied about the amount of money there was. He lied that his wife wasn't a part of this, but then yesterday he said my wife was with us, and I think that's really important so the entire time he tells the detective I don't think my wife is, my wife was no part of this. Yesterday he said my wife was with us. What reason does he have to do that? Well, he discovers that, you know, there's an affair and so, yeah, I'm going to take her down, too. He's taking [281] down his enemies. That is what he's doing. He's got bias against Mr. Currier for having an affair. That was something that was raised by the Commonwealth before I even raised it, you know, asking about the affair. We don't know—he denied it.

We don't know what to believe with him, but we have Mr. Wood wanting to take down his wife, take down Mr. Currier for the affair and also implicate Dennis Wood because Dennis said, you know, Mr. Bradley did this other crime and we heard testimony about that yesterday, too, so that's what he's doing. He's in jail; he's picking out his enemies. That's what it looks like and his record speaks for itself so he's got felonies and he's got crimes of moral turpitude, and you'll see the instruction, you may consider proof of a witness's prior conviction of a felony or a crime of moral turpitude as affecting his credibility. It does not render him incompetent to testify so what that means is that he can testify, I mean, it's not like he's barred from testimony. He's competent to sit here and tell you what he did, but the fact that he has a felony means that you have to seriously question what he says and the fact that he has crimes of moral turpitude, lying, cheating, stealing, he has defrauding, fraud charges and stealing charges. You know, that means that you have to seriously consider his morals and what he's doing. Turpitude, I looked it up in the dictionary last night. What does [282] turpitude mean? The New Oxford American Dictionary, just the dictionary on your Apple computer will say it means wickedness. You and I, we don't have these problems that Mr. Wood has when he comes in and wants to tell you something. We don't have felonies or crimes of moral turpitude to worry about, he does. So, imagine how evil it is to get mad at somebody and say, yep, they did this crime with me. He provided no details yesterday about the crime that he committed. He just said, yep, this is who it was, this is what we did. He didn't explain how two men, himself and Mr. Currier, could lift up a seven hundred (700)

pound safe or do anything about that. He didn't tell us how they opened the safe or broke in. There's no details at all. Just, yep, he was with me. And this is the government's star witness. This is the person that places Mr. Currier there definitively. So remember the doctor example. Let's go back to reasonable doubt. The doctor gave you pause. It was a routine checkup. Everything is okay but later he says risky surgery is required and gives you pause, reason to doubt what the doctor— maybe I want to go get a second opinion. The source of information that you have today from Bradley Wood should give you pause. The source of information that you have from Cynthia Sandridge should give you pause in this important decision. Unreliable testimony is how innocent people go to jail. That's why the system is in place [283] and the standards are so high. On unreliable witnesses, on biases, on motives to fabricate stories, on unreliable accusers, the quality of this evidence that you've heard today is bad. It's not simplistic math, it's not an algorithm, this one plus one equals X. It's not just whether you believe it's believable that you have to— we heard—Mr. Quatrara read the instruction many times about you cannot disregard believable testimony, and above that in jury instruction I believe it's #1 says you may consider the appearance and the manner of the witness on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, their prior inconsistent statements and whether they've testified untruthfully about anything in this case. Now the Commonwealth gets the last word so this is the last time I'm going to get to speak to you; otherwise,

this would be a ping pong match, you know, going back and forth both of us saying, this is what I believe, this is what our position is, what our position is. When you hear his points that he has to make in response to what I say, keep what I say in mind, everything that I said. When you go back to the jury room and when you go back into the jury room ask yourself the question, do you have total confidence in the Commonwealth's [284] case that you can put a man who is presumed to be innocent in jail? Thank you.

* * *

[291:24]

THE COURT: And then I believe then that just leaves the possession of a firearm charge?

[292]

MR. BARNHARDT: Yes, Your Honor. We have a motion, would like to make a motion to dismiss the possession of a firearm charge based on collateral estoppel. Just very briefly, the Court has to or the jury would have to find—well, we've got a statement of fact today. We had a finding of fact that Mr. Currier did not steal, break and enter or steal firearms, and I think there's no other way for, and I think that that issue then the jury would be estopped from hearing that, and there's no other way that possession can be made in this case without that finding. They have to—they can't find that Mr. Currier possessed firearms when they are going to be prevented from knowing that he stole the firearms and so I make a motion to dismiss on those grounds.

* * *

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA

Plaintiff, Case No. CR: 12-613

v.

MICHAEL NELSON CURRIER [Filed: Nov. 20, 2013]

Defendant.

Brief in Support of Defendant's Motion to Dismiss And Defendant's Motion to Preclude Evidence By Collateral Estoppel

COMES NOW the Defendant, by counsel, and asks the Court to consider the following:

FACTS

On March 8, 2012, Paul Garrison II and his son Paul Garrison III were victims of theft. Paul Garrison II's house was broken into. His safe was stolen. The safe contained firearms, money, and other family possessions. The same safe was found in a river by Albemarle County police officials three days later. The firearms and family heirlooms, and some of the money were recovered at the scene where the safe was found. The firearms and heirlooms were badly damaged. A large portion of money was never recovered. Bradley Wood was arrested, charged, and plead guilty to breaking and entering the Garrisons' house, stealing their safe, and being a felon in possession of firearms. Michael Currier ("Defendant") was arrested and charged as an accomplice to the same crimes.

PROCEDURAL HISTORY

Defendant was arrested, and he waived his right to a preliminary hearing. At the request of the Commonwealth Attorney, Defendant's case was severed because it would be "reversible error" to try the felon in possession of a firearm charge together with the other charges. The trial date for Defendant's charges of breaking and entering the Garrisons' home and stealing the Garrisons' safe set for September 17, 2013. The trial date for Defendant's charge of being a felon in possession of a firearm was set for October 2, 2013. The September 17, 2013 trial resulted in a mistrial due to the Court's inability to seat enough jurors. That matter was scheduled to be tried again on October 28th and 29th, 2013. The Commonwealth and the Defendant moved to continue the Felon in Possession of a Firearm trial under after the October 28th and 29th jury trial.

On October 29, 2013 a jury found the Defendant not guilty of stealing the Garrisons' safe and its contents. After the acquittal, Defendant made a Motion to Dismiss the felon in possession of a firearm case for reasons of collateral estoppel. The Court did not make a ruling at that time. The Defendant subsequently moved this Court to preclude all evidence related to the breaking and entering and grand larceny at the Garrisons' house. Defendant now writes this brief in support of both his Motion to Dismiss and his Motion to Preclude Evidence under the doctrine of collateral estoppel.

* * *

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

[FILED: December 6, 2013]

COMMONWEALTH

v. Case No. CR: 12-613

MICHAEL CURRIER

COMMONWEALTH'S REPLY TO DEFENDANT'S MOTION TO PRECLUDE EVIDENCE BY COLLATERAL ESTOPPEL

COMES NOW the Commonwealth, by her assistant attorney, Matthew J. Quatrara, and respectfully replies to Defendant's Motion to Preclude Evidence by Collateral Estoppel. In support of her reply, the Commonwealth avers the following:

Procedural Posture

1. The Commonwealth adopts the procedural posture set forth in Defendant's motion, subject to the following additions:

2. Defendant was charged with grand larceny, breaking and entering, and felon in possession of a firearm by warrant on the same day.

3. Defendant was served with the grand larceny, breaking and entering, and felon in possession of a firearm warrants on the same day.

4. Defendant waived his right to preliminary hearing on the grand larceny, breaking and entering, and felon in possession of a firearm charges on the same day.

5. Defendant was indicted by an Albemarle County Grand Jury on his grand larceny, breaking and entering, and felon in possession of a firearm charges on the same day.

* * *

COURT REPORTER'S TRANSCRIPT
December 17, 2013

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the December 17, 2013, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

HEARING ON MOTIONS TO DISMISS AND TO PRECLUDE EVIDENCE (DOUBLE JEOPARDY)

* * *

[305:14]

THE COURT: So, let the record reflect this is the case of Commonwealth versus Michael Nelson Currier. Mr. Currier is in the courtroom with his counsel, Mr. Barnhardt, and Mr. Quatrara is here on behalf of the Commonwealth and this is how the Court is going to rule. When the Court looked at *Phillips v. the Commonwealth*, for the record, 20 Va. App. 674, there was an explanation as to double jeopardy and the collateral estoppel issues that arise, and in that particular case the Court found that when charges are brought simultaneously, it prevents the Commonwealth or prosecutors from using the prosecution of a minor offense as [306] a dress

rehearsal for a more serious later prosecution, or in the alternative, that double jeopardy and collateral estoppel are designed to prevent the Commonwealth from subjecting the accused to the hazards of vexatious multiple prosecutions. The statute prevents a prosecutor from subjecting the accused through successive prosecutions to embarrassment, expense, ordeal or compelling him or her to live in a continuing state of anxiety or security. I find that those concerns are not applicable in this case. The Commonwealth was not even in a position where they could consider trying these cases simultaneously. It would have been prejudicial to the defense and Mr. Barnhardt is correct, it is not permitted by law and, therefore, I find that collateral estoppel does not apply in this case and that the Commonwealth does not have the ability to try these matters simultaneously, and the concerns that serve as the basis for collateral estoppel and double jeopardy are not concerns that are raised by the facts of this particular fact under the statute, so the defense motion is denied and your exception to the Court's ruling is certainly noted.

* * *

COURT REPORTER'S TRANSCRIPT
March 11, 2014

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the March 11, 2014, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

JURY TRIAL AND HEARING ON MOTION IN LIMINE

* * *

[307:1]

THE COURT: So, let the record reflect this is the case of Commonwealth versus Michael Currier. Mr. Currier is in the courtroom with his counsel, Mr. Barnhardt. Mr. Quatrara is here on behalf of the Commonwealth, and we are here today for a trial by jury on the possession of a weapon after having been convicted of a felony charge and I understand there's a motion in limine, Mr. Barnhardt, is that correct?

MR. BARNHARDT: There is, Your Honor, yes. I filed a motion in limine and there are really three distinct issues in the writing that was filed and we'd ask for a ruling on all three. They all flow together, so depending on what the Court would prefer, I can just

address, address it all as a whole now or we can take them one by one. I'm prepared to just address them as a whole if that would be easier.

THE COURT: I would say to address them as a whole because I think they are interrelated.

MR. BARNHARDT: Thank you. Just to be clear, we are not going to be arguing collateral estoppel or double jeopardy. Sometimes with the nature of this case it might seem like that. I really—we understand the Court's ruling [308] that collateral estoppel doesn't apply because this is the same case, not separate cases, so we are not arguing double jeopardy. We want to preserve it for the record but that's not the point of this motion in limine today, though we are still trying to prevent evidence of breaking and entering and theft of the Garrison's house and of the Garrison's safe, and the reason being that we don't—that it's not relevant to the crime of possessing a firearm. To possess a firearm—this is a case that is about possessing a firearm and not about stealing a safe or going into the Garrison's home, and the main reason to do that, to make this argument is that there was nothing having to do with a firearm at the Garrison's home where this took place. A safe was taken and our argument is that you cannot possess a gun that's in a locked safe. You don't know the nature and character of the weapon/of the gun inside when there's a locked safe. You can't intend to possess what you don't know is in there, and the big one is really dominion and control. You don't have dominion and control over a gun that's in a locked safe, and the best analogy under the established case law is a locked glove compartment in a car, and the Virginia Supreme Court has ruled that if you're a passenger in a car and there's a locked glove

compartment, you do not have dominion and control over what's in there. If you have the key, then you have the means to get in, and so in this case if the [309] defendant had a key to get into the safe then that would be a different story or if the safe was open to the house that would be a different story because possession of a firearm would be relevant at the house, but because of the nature of this fact, nature of this case, the safe actually had to be taken away from the house in order for the means/ in order for the safe to actually be opened, so possession of a firearm has nothing to do with the house but only with when the safe is opened, and I know that the Commonwealth may argue that if you have the means, that all you need is the means for constructive possession, and so if they went in with tools or if they wanted to rip the safe open, then that might be enough for constructive possession at the house but I think that that would be, I don't think that that's what the law is and I think it would be a dangerous precedent. That would like saying that somebody could rip the glove compartment open in a car and so that they have possession even though it's a locked glove compartment or that if somebody is walking by a car or leaning against a car and there's a gun in the car that they could be possessing that gun because they could break into the window or they can use a brick and break in. I think it would be going too far to say that one has dominion and control over a locked compartment because they could do something to tear into it and I don't think there's any case law at all about that. [310]

And the Commonwealth, make no mistake, the Commonwealth does have a case for when the safe is opened. They've got a witness who is going to testify,

Bradley Wood who will testify that when the safe was opened, Mr. Currier was with me and then whatever we did after that, throwing the safe into the river or what-have-you. They have DNA evidence that can connect Mr. Currier and Mr. Wood, so there is a case that the Commonwealth could make without having to use all of this evidence of breaking and entering into the Garrison's house and stealing a safe from that house. If you look at the subpoenas that the Commonwealth has issued in this case, it's everybody from the last trial and I would submit that it's not relevant to have, it's not relevant to have a lot of that information come in that came in in the last trial. The main piece of evidence that is not relevant, I think, is the testimony of Cynthia Sandridge who is the eyewitness in this case. If you go back—through the trial testimony she mentions nothing about the safe. She mentions nothing about guns. It's only a matter of seeing somebody leave a house, and so that evidence is about breaking and entering and about theft. It has nothing to do with possession of a firearm, and so I don't think that that should—her evidence is relevant in this case as well as the Garrisons describing, who were the victims in that previous case, and having the Garrisons describe about coming home and finding [311] the door broken into and the house violated and Detective Underwood's, you know, investigation of that breaking and entering and going around to Bradley Wood's house and that entire piece of testimony is not relevant to the possession of a firearm. Now, Detective Underwood can certainly testify about, you know, he was the one that found the guns in the river, so he has a role to play here and the Garrisons I'm sure they have a role to play saying

those are my guns, but to go through all the facts of what happened in terms of the breaking and entering into the house, that was a different case and it's not relevant to Mr. Currier's alleged possession of a firearm. It's—and it would be prejudicial. That's the second argument. So, not only is it not relevant, but it would be prejudicial to allow that because it would be effectively allowing the Commonwealth to bolster their evidence about breaking and entering and theft when that's not what the jury is going to decide today. I think it could be very confusing. It's going to be candidly confusing for me to try and separate out, you know, if this is a case about possession of a firearm but I've also got to defend about this breaking and entering and these bad acts that the Commonwealth would offer against my client which would show his propensity to then possess firearms which I don't think that is allowed either, but in the end, it's just prejudicial and would be confusing to the jury. And [312] then the last part of the motion in limine is that even if Your Honor finds that this evidence is relevant and they're going to allow the big picture in this case, then I would ask the full picture be shown to the jury that Mr. Currier was found to be not guilty of the breaking and entering and the grand larceny. That way the jury can have a clearly demarcated line between breaking and entering and theft, even though the Commonwealth would bring that evidence up, and possession of a firearm which is what will focus them on what they're supposed to decide today rather than trying to figure out if he stole guns and if he—I think that just makes sense to me and would be the fair and equitable way to do it if you allow the evidence in. So, just to briefly repeat, we want to prevent the evidence

because we don't think it's relevant. We think the case should be focused simply on when the safe is opened and when possession can take place, but if you think that it is, if you're going to rule that it is relevant we think it's prejudicial and that the entire story should be shown and all of the evidence should be there if we're going to open it all up and to allow Mr. Currier to present the not guilty verdict from the last trial. That's our argument.

THE COURT: Mr. Quatrara.

MR. QUATRARA: Yes, Your Honor, thank you. I'll take his arguments in reverse, Judge. With regard to the [313] prior acquittal, from the Commonwealth's perspective, it seems that the defense is no more entitled to bring in evidence of the prior acquittal than would the Commonwealth be entitled to bring in evidence of the conviction on the same facts for the same reasons. They're, in effect, two separate findings of fact by two separate fact-finders, same proceeding for purposes of collateral estoppel but two separate fact-finders, and so from the Commonwealth's perspective, that prior acquittal is no more admissible than would be the prior conviction were the situation reversed. With regard to the prejudice issue, I understand Mr. Barnhardt's concern and it makes sense and it's one that I would argue if were—certainly if I were sitting in his chair. From the Commonwealth's perspective, unfortunately, however, the issue is one of res gestae. It is the—it is the entirety of the circumstances. It's impossible for the jury to understand how we get to a safe in the river without the—and how we connect Mr. Currier to the safe in the river without that prior, that prior involvement there in the house. With regard to the

relevance issue, counsel states that the stealing is not relevant, the breaking and entering is not relevant, and that you can't possess a—I'll take his arguments in tandem. You can't possess a weapon in a locked safe without knowledge. At this point, Your Honor, the [314] Commonwealth certainly, as a function of the jury instructions (unintelligible) would certainly I think have to prove knowledge but that's a jury question. Whether we prove knowledge or whether we don't, we'll find out soon enough but that's a jury question, that's a weight question, not an admissibility question. As to the dominion and control component, Mr. Barnhardt brings up the glove compar—the locked glove compartment issue. The glove compartment exception is actually not a creature of the law of possession. The glove compartment exception is a function of statute at this point. It's a function that you're not guilty of possessing a concealed weapon, for instance, that's locked in a statute (sic), so that's issue one, that's locked in a, not in a statute, locked in a glove compartment, so that's issue one for the Court's consideration. From the Commonwealth's perspective, though, the dominion and control is a function of the knowledge. Certainly, a defendant sitting in a passenger's seat of a locked glove compartment without a key who has no knowledge of the firearm certainly can't have dominion and control. The person sitting in the passenger's seat of a locked glove compartment in the passenger's seat who knows about the firearm, maybe that's a different question. Maybe he has dominion and control, maybe he does not. Certainly, Your Honor, the person sitting in the locked—in the car in the passenger's seat with the [315] locked glove compartment with the key has

dominion and control, and from a practical perspective, a person sitting in a passenger seat of a motor vehicle with a crowbar, with a power drill, with something that has the ability to effectuate the same result as the key with that knowledge, if it be borne out, also has that dominion and control. Again, all of that is a—is a jury question. There is no practical difference, from the Commonwealth's perspective, between defendant standing outside safe with key to safe or with combination to safe and defendant standing outside safe with—with crowbar, drill, whatever mechanism. The second issue with regard to that, Your Honor, is it may well be determined, perhaps, that Mr. Wood is the person who had all of those things. He had the power drill; he had the crowbar; he had whatever the mechanism was that ultimately got them into the safe. Under the law of concert of action, a principal in the second degree, let's not forget the evidence will show Bradley Wood is a convicted felon, and so if Mr. Currier aids or abets Bradley Wood's possession of that firearm, even if Mr. Currier doesn't possess it, and the Court can anticipate hearing this argument again at some point later on today. If he facilitated Bradley Wood's possession, then he's a principal in the second degree, whether he actually possessed it or not, and so based on those considerations, Your Honor, we'd ask the Court to [316] consider denying defendant's motion. Thank you.

THE COURT: Rebuttal, Mr. Barnhardt.

MR. BARNHARDT: Thank you. Just to repeat, Your Honor, that they do have a case for possession of a firearm, and that case begins when the firearm can be possessed. Anything else is not relevant and it

would just only be used to prejudice Mr. Currier. As for the not guilty verdict, it's an order of the Court already in what you've already ruled as the same case, and I don't know of any case law or any rule that prevents it from coming in.

THE COURT: So, here are the observations of the Court and then the Court is going to make its ruling. I find what both counsel are arguing is that this case is very fact specific and the determination for the jury is based upon those facts. I agree with Mr. Barnhardt. If he goes in—if someone goes inside the home and there's a locked safe, there's no showing of knowledge of what is actually contained in that safe; however, I do think it's relevant if someone goes in to possess the safe regardless of what's in it, and the Commonwealth can show that someone was acting in concert together to remove the safe. Now that may not be sufficient and that may be appropriate for a motion to strike if that's all the evidence the Commonwealth has, but if there's additional evidence that somebody then did have a crowbar or somebody had a blow torch, somebody had it down [317] by the creek and they found the guns and that a co-defendant says that Mr. Currier was with me and we decided we didn't want the guns and we threw them into the creek, that could be an entirely different situation but I don't think that the Court, I don't find that the evidence is so overly prejudicial that it prejudiced—that it should not be permitted. I find that its probative value does outweigh the prejudice in this case both as to the dominion and control and as to the knowledge. I'm not making any finding with regards to the principal in the second degree argument. I don't find I have to do so for this ruling. I'm also not going to permit the jury to be told that the defendant was not

convicted of the breaking and entering/grand larceny. Mr. Quatrara is right; if he had been found guilty, I would not tell a jury. They are considered separate determinations, and the Court is going to treat them separately so your motions in limine are denied. Your exceptions to the Court's ruling are noted.

[318:6]

THE COURT: So, the Court is going to find for the record that the defense, in order for there to be an orderly trial, is now stating that they have a continuing full objection to the presentation of any evidence with regards to the safe being, for example, in the home related to the breaking and entering as opposed to testimony where the guns were actually found.

MR. BARNHARDT: Yes.

THE COURT: That the basis for the defense objection is that it is not relevant, that it does, that it does, it's not, it's too prejudicial rather than probative and should not be presented to the jury.

MR. BARNHARDT: Yes.

THE COURT: Did I miss anything, Mr. Barnhardt?

MR. BARNHARDT: No.

THE COURT: So, the Court is going to find that's an ongoing continuing objection and will for the record overrule it but not require the defense now to have to stand up before every witness.

MR. BARNHARDT: Thank you.

* * *

COURT REPORTER'S TRANSCRIPT
March 11, 2014

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the March 11, 2014, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

TESTIMONY OF WILLIAM UNDERWOOD

* * *

[DIRECT EXAMINATION]

[By: Mr. Quatrara]

[359:17]

Q Did you recover any other item of evidentiary value that you ultimately submitted to the Department of Forensic Sciences?

A I did. There was also a smoked cigarette butt in the bed of the truck.

Q And did you collect that and submit that to the Department of Forensic Sciences?

A I did.

* * *

[CROSS-EXAMINATION]

[By: Mr. Barnhardt]

[379:23]

Q When you found the safe in the river, the door of the safe was closed, isn't that right?

A Yes.

[380]

Q Okay, and the guns were recovered from inside the safe?

A Yes.

* * *

COURT REPORTER'S TRANSCRIPT
March 11, 2014

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

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This is a partial transcript of the proceedings in the above-named matter conducted on this date.

TESTIMONY OF CYNTHIA SANDRIDGE

* * *

[DIRECT EXAMINATION]

[By: Mr. Quatrara]

[385:1]

Q All right. Tell the jury about the vehicle that you observed, where was it relative to the residence, and what did you see?

A When I heard the vehicle crank up, I got up and went out on my front porch to see what was going on, and I witnessed the pickup coming out of the driveway.

Q What color was it?

A A white pickup.

Q Okay. How many people were inside?

A Two, that I could tell, two.

Q Now, are you certain that there was two people in the pickup or might there have been a third?

A There could have been a third. I saw two people that I could see.

Q Okay. Now, were you able to identify who the driver of the pickup was?

A No, sir.

Q Why not?

A I couldn't see him because of the glare on the windshield.

Q Okay. Now, when the truck turned, did it turn, when it pulled out of the driveway did it pull out with the passenger's side facing you or with the driver's side facing you?

A With the passenger's side facing me.

[386]

Q Were you able to identify the person in the passenger's seat?

A Yes, sir.

Q Do you see that particular person here in court today, ma'am?

A Over here.

Q Your Honor, if the record will reflect she's pointed out Mr. Currier.

THE COURT: So, the record will reflect that she has identified the defendant.

Q Now, did you at that point notice if there was anything in the bed of the, on the back of the truck?

A Yes, sir, I did see the safe in the back of the truck.

Q Okay. You saw a safe in the back of the truck?

A Yes, sir.

Q Now, did there come a time in which you—you got interviewed by police that day, correct?

A Yes, sir.

Q The day that you saw the white truck pull in? Now at that point I'd ask you this question. Were you under the influence of any substances or anything?

A No, sir.

Q Okay.

A No, sir.

[387]

Q Ever been convicted of a felony?

A No, sir.

Q Ever been convicted of a misdemeanor that involves lying, cheating, or stealing?

A No, sir.

Q Okay. After you gave that first interview, did there come a time in which you were interviewed at your work place by Officer Underwood?

A Yes.

Q Okay, and did he show you a photographic lineup at that point?

A Yes, sir.

Q Now, at that point were you aware of any news media coverage involving this particular investigation?

A No, sir.

Q Do you get the newspaper out at your home?

A No, sir.

Q And what kind of television service do you have at your house?

A Direct TV.

Q All right. What, if any, local channels do you get with your direct TV?

A None.

Q None? Do you get Richmond for your CBS or you don't get any of that, NBC—

[388]

A No, I don't get any of that.

Q Okay. So, you don't get 29, you don't get 19, none of the local news outlets?

A No, sir.

Q Now, when Officer Underwood administered the lineup, photo lineup to you, did he talk with you at all while you were going through the photos?

A No, sir.

Q Did he make any suggestion to you as to who the person was that you were looking at?

A No, sir.

Q Prior to that day, had you ever seen that person before?

A No, sir.

Q Do you know this gentleman personally at all?

A No, sir.

Q No relationship with him, anything like that?

A No.

Q Ms. Sandridge, those are all the questions that I have for you. This is Mr. Barnhardt. He represents Mr. Currier. He may have some questions for you or the Court may have some questions for you.

[389]

CROSS-EXAMINATION

By: Mr. Barnhardt

Q Thank you, Ms. Sandridge. So, March 7th, 2012 was during the daytime when you were hearing banging across the street. That was just a normal day for you, right?

A Yes, sir.

Q You weren't at work—

A No, sir.

Q —and that was normal for that day?

A Yeah.

Q How long have you lived across the street from the Garrisons?

A Thirty (30) years.

Q Okay, and you're friendly with them?

A Yes, sir.

Q Good neighbors?

A Oh, yes, sir, awesome neighbors.

Q Do you know their kids?

A Yes, sir.

Q Now, you said you heard a truck start up and you went to the window, right?

A I went to the window and then I went out on my porch.

Q All right, and so what made you take that extra step out?

[390]

A Because I heard things going on across the street. We kind of look out for each other being that far out in the country—county.

Q And so you saw a white truck coming up the driveway when you looked out?

A Uh-huh (indicating yes).

Q And there were glares and stuff on the windows so you couldn't see it when it was facing you.

A Yeah.

Q But then you got a, kind of got a glance inside when it was—

A Got the side view.

Q And the Garrisons owned a white pickup truck on March 7th, right?

A Yes, sir, they did.

Q And so you thought this could have been one of the Garrisons', their son's truck just leaving?

A Yes, sir, I thought it was their son's truck, that's why—

Q So, when you were looking at the truck coming by you, you didn't think anything was out of the ordinary.

A Not at first I didn't, no, sir.

Q But you took a step outside because you wanted a closer look, and can you explain why?

A I always do. It's just a habit.

[391]

Q Oh, okay, all right.

A We kind of, like I said, we look out for each other, so—

Q So, could you describe the truck? Were there any other features of the truck that you could describe besides the fact that it was white?

A It was white with an orange stripe. It was a later model truck, older model truck.

Q Can you tell us more about the orange stripe? Did it go from end to end of the truck?

A I think it did, yeah.

Q And about how thick was it?

A Like this.

Q So, that's about three inches?

A Yeah, it looked enough like their truck that I didn't really, you know, I thought it was them over there.

Q Now, so let's talk about, you know, who you saw inside the truck. You originally said that you thought it was two people in the truck, right, when you were first interviewed?

THE COURT: I'm sorry, you have to answer yes or no.

A Oh, I'm sorry, yes, sir. Sorry, sorry.

Q We have a court reporter so we've got to get it all verbally.

[392]

A Yes, sir. I apologize.

Q So, you said originally on the first date that you were interviewed that it was two people that you saw in the truck.

A I said it was two. It could have been more.

Q It could have been more.

A Yeah.

Q You couldn't tell.

A Yeah, when they first come out I couldn't tell.

Q But you said later on, in September, 2013, you said when the officer and the Commonwealth's Attorney went to your house, you said it was three people, right?

A I said it could have been three people. I wasn't sure.

Q I want to make sure I get it straight. At first you said it could have been two and then you said it could have been three?

A Yeah, I guess.

Q And then today you testified that it was two people?

A I'm thinking that's what I said, yeah, from the get-go was two people.

Q But you haven't been sure, right? I mean it was—

[393]

A Well, I told them somebody could have been laying in the back of the truck, I didn't know. I couldn't see that.

Q Now, where, you said you saw a safe in the truck. Where was the safe?

A On the bed of the pickup truck—

Q And—

A —close to the end of the bed of the pickup truck, to the tailgate end.

Q And what color was it?

A It's brownish-gray. I don't—grayish, brown-black.

Q How could you tell it was a safe?

A You could see the knob on it. I could tell it was a safe.

Q You could see a knob?

A We have one just like it, so I knew what it was.

Q Pointed towards you, the knob was? Now, the truck took a left out of the driveway so you got to see the passenger side of the truck, right?

A Yes, sir.

Q And did you tell the officers that you could describe what the passenger looked like?

A Yes, sir.

[394]

Q And what did you, how did you describe the passenger?

A I don't think I described the passenger. I think they just showed me the photo lineup.

Q No, on the first day that you first talked— the photo lineup was a couple, was about a week later.

A Yeah.

Q Is that right? So, on the day that—

A I'm trying to remember.

Q When you were first investigated, you described a passenger having light brown hair to Officer Underwood, is that right?

A The driver.

Q You said the driver had light brown hair. Okay, and the driver was small in stature.

A Or he looked small is what I said.

Q So, you could see—

A Medium, small is what I said.

Q I want to make sure I get it right. They're sitting three across in the truck? I mean, it's not one of those trucks with a back seat?

A No.

Q So, it's three across, so you could see the driver's features but you couldn't see the other people's features in the car, is that right?

[395]

A I couldn't see the driver's features. I could see the light brown hair.

Q Okay, but you couldn't see the hair color of the other passenger?

A Well, I saw him sitting at the passenger window, yeah, but they didn't ask me to describe him.

Q I'm just—okay. You said that you could identify the passenger but you could not describe any features on the passenger, right? Is that what you're saying right now?

A They didn't ask me to describe any features of the passenger. I just said I'd know what he looked like if I saw him again.

Q So, they didn't ask about any sort of facial hair or any sort of hair color or clothing?

A Not that, not that I remember. I don't think so. I'm not even sure now.

Q But you did have that conversation about the driver.

A Yeah.

Q So they—

A And I think I said he was medium build with light brown hair is what I said.

* * *

COURT REPORTER'S TRANSCRIPT
March 11, 2014

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

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This is a partial transcript of the proceedings in the above-named matter conducted on this date.

TESTIMONY OF BRADLEY WOOD

* * *

[DIRECT EXAMINATION]

[By: Mr. Quatrara]

* * *

[401:7]

Q Let's talk a little bit about the events that led up to March the 7th, 2012. Did you come up with the idea of going into your aunt and uncle's place with the safe and the guns and all that kind of stuff? Whose idea was it?

A It was another family member's.

Q Okay. Who was the other family member?

A Dennis Wood.

Q At what point was—did there come a time in which Michael Currier was enlisted to take part in the events?

A Yes, sir.

Q Do you see Michael Currier in the courtroom?

A Yes, sir.

Q Could you point him out, please? If the record would please reflect he's identified Mr. Currier.

THE COURT: The record will so reflect.

Q How did you know Mr. Currier during the time leading up to March the 7th, 2012 with relation—

[402]

A We was incarcerated together before. If you look back, we was at several places together before.

Q Okay. Now, with regard to the plan that led to the events of March the 7th, tell the jury what, if any, conversation did you have with Mr. Currier about what you were going to do and what you expected to find once you were there?

A Well, what I was led to believe was a large sum of money, a hundred thousand (100,000) or better in the safe.

Q And did that information come from Mr. Currier or did it come from somebody else?

A No, it come from someone else.

Q All right. What conversation did you have with Mr. Currier about it?

A Well, when I brought up about the money, he came into—he was in the red on child support and he really needed some money.

Q And so you had a conversation with him about this?

A Yes, sir.

Q When was that conversation relative to when the event actually happened?

A It was several times prior to that.

Q How many times?

[403]

A Numerous times. I couldn't tell you to be honest.

Q Okay. During that time period, in those conversations, was there ever any mention between you and Mr. Currier about what kind of safe or what kind of location the money at issue was located?

A I don't think it was ever brought up what kind of safe it was, but we went and rode by the house to the location.

Q At the house?

A Yeah.

Q How did you know about their—you said you found out from Dennis about the money.

A Yeah.

Q What led you to—you and who went to the house?

A Me and Mr. Currier.

Q Anybody else?

A And Samantha.

Q Okay, Samantha is who?

A Well, that's my wife.

Q Okay. When you got to the house, what did you do?

[404]

A We rode by the house the first day and a work truck was there so we knew, basically Paul Garrison, II was home so we had to leave.

Q Okay.

A Made a phone call, the person said he was leaving to go help his son do a sprinkler system sometime that day from Dennis. We went back and he was gone.

Q What happened when you went back?

A He was gone. We went to the rear of the house.

Q What were you driving that day?

A Started out in a car.

Q Did that change?

A Yeah.

Q Why did it change?

A Because when we went in the house and we went into the bedroom where the safe was located, Mr. Currier swore that he could take a cutting torch and get into the safe. Well, he couldn't.

Q Okay. Did he try to torch it right then and there?

A Right in the bedroom, run out of gas on the tank so we had to leave.

Q Okay, so you left in a car.

A In a car.

Q Did you come back in a different vehicle?

[405]

A Went back to my residence and got a truck, came back and loaded the safe up and took the safe away.

Q Now, when you took the safe away, where did you take it?

A I really can't tell you to be honest. Schuyler, Nelson County, somewhere in that part.

Q Where did you ultimately, you ultimately were able to get the safe open.

MR. BARNHARDT: Object to leading, Your Honor.

A Yes.

THE COURT: Sustained.

Q Thank you. Did there come a time in which you were able to render the safe in a different condition than the condition in which you found it?

A Yes, we opened the safe.

Q All right, and how were you able to open the safe?

A Pry bars and wedges.

Q Okay. Who was there when the safe got opened?

A Me, Samantha and Mike.

Q And what did you discover when you opened up the safe?

A When it first got opened, we discovered a large quantity of guns.

[406]

Q Okay, and did you handle those guns when it was opened?

A No, I didn't want no parts of them.

Q Okay. What about Mr. Currier, did he touch the guns?

A Yes, yes, he took them out and laid them on the bed of the truck.

Q Okay, and did you have any conversation with Mr. Currier about the firearms in the safe and what ought to be done?

MR. BARNHARDT: Your Honor, I object to leading again.

Q That's not leading.

MR. BARNHARDT: It's a yes or no—

Q It's not leading.

MR. BARNHARDT: —question.

THE COURT: I'm going to ask if the Commonwealth would rephrase.

Q What, if any, conversation and what, if any, substance to that conversation did you have with Mr.

Currier about the guns once they were discovered and Mr. Currier (unintelligible).

A I said we was convicted felons already, I wanted no parts of the guns, to leave the guns behind. The deal was money.

[407]

Q Now, Mr. Currier knew you were a convicted felon, is that correct?

A Yes.

Q How did he respond to your statement with respect to, we are convicted felons already, I don't want any part of these guns? How did he respond?

A His response was, we'll leave them on the bed of the truck, we'll go through, get the money, put the guns back in the safe, throw the safe in the water.

Q Okay, and is that what you did?

A That's exactly what happened.

Q How much time elapsed between the time you went into the house on March the 7th and the time that you dumped the guns?

A We actually went in, like, in the morning time, we left and came back. It was probably three or four o'clock when we—I'd say five o'clock at the latest we dumped the safe.

Q All in the same day?

A Yes.

* * *

[CROSS-EXAMINATION]

[By: Mr. Barnhardt]

* * *

[413:11]

Q You originally said you were in the passenger's seat, right?

A Yeah.

Q That wasn't true?

A No.

Q So, you were in the driver's seat and it was your truck.

A In the truck.

Q You originally denied going to the river and disposing of the firearms, right?

A Yeah.

Q But then you testified that that was a lie, too.

A Yeah.

[414]

Q You lied about how much money was taken. You said originally it was only twenty thousand dollars ($20,000) but it was a lot more than that, wasn't it?

A Yeah.

Q Now, you sold firewood with Mr. Currier before, isn't that right?

A Yeah, I know where this story is going, same story, we had a fallout over firewood, no.

Q No, I just asked you—I just asked you about the firewood, and, you know, I guess—

A Yeah, it's the same story you used last time. We had a fallout over firewood, that's why I'm trying to get him, no.

Q So, you never had a falling out---

A No.

Q —over firewood at all?

A No.

Q That you were selling firewood for more than he was selling it to you.

A Yeah.

Q That never happened.

A He rode with me and sold it with me, I mean, so how did we have a fallout over it?

Q And you never had a falling out over your wife learning about an affair?

[415]

A No. No.

Q You were never squealing wheels by his—by Mr. Currier's house—

A No.

Q —and calling him a whole bunch of times?

A No. If they had an affair, it was after I was incarcerated, no. When he was out joy riding and running around, I was in in jail.

Q Those are all the questions I have, Your Honor.

* * *

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March 11, 2014

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

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This is a partial transcript of the proceedings in the above-named matter conducted on this date.

MOTIONS IN LIMINE

* * *

[423:7]

THE COURT: So, motions, Mr. Barnhardt?

MR. BARNHARDT: Yes, Your Honor, we want to remind the Court of our continuing objection to the evidence we heard today from Paul Garrison II, Paul Garrison III, Cynthia Sandridge, and Detective Underwood as it pertains to the breaking and entering and theft charges and also of Bradley Wood as it pertains to those charges, renewing the motion that I made, the fact that—our argument that they were not relevant to the crime of possession of a firearm and they were unduly prejudicial if relevant. Just reminding the Court of those objections and also at this point I want to renew our objection for---that that evidence should have been barred due to collateral estoppel, which the Court has ruled on, but we still feel

like there are double jeopardy issues for retrying the case entirely again and your ruling, I assume, is the same on those.

THE COURT: It is.

MR. BARNHARDT: Okay, and we'd also like to make a motion to strike the evidence. The Commonwealth has got to [424] prove knowledge, intent, and dominion and control and we have—I think that there's no evidence about the safe so their case comes down to Bradley Wood's testimony about taking guns out of the safe and putting them—Mr. Currier taking a gun out of a safer putting it on a bed, putting the gun back in the safe and, Your Honor, I do not think this shows intent to possess firearms at all, especially the fact that Detective Underwood testified that all twenty (20) guns that were taken were still found inside the safe.

* * *

[430:3]

MR. QUATRARA: And to be clear, it's an argument in the alternative. It's absolutely two separate and distinct arguments. One, that Mr. Currier possesses by virtue of his knowledge plus dominion and control in moving the firearms. Two, if he's not that, then he aids and abets and may well be guilty. A jury could find him guilty that way as well. So, it's an either/or construct.

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CLOSING ARGUMENTS

* * *

[448:6]

MR. QUATRARA: Thank you, Your Honor. It's hot and it's late, two bad combinations, so I'm going to try and make this as quick as I can. There are times when, as a prosecutor, it's my job to be an advocate. It's my job to have histrionics and to emotionally argue things. You saw a little bit of that during the trial with regards to some issues of law that came up and you might see my animation level go up at that point. Today with this case, that's not what today is. Whether or not I think the evidence is sufficient doesn't really matter. It's about what you think.

Today it's your call. I'm going to present to you some things as food for thought and I'm going to let you-all go back there and let you make the decision. You-all are the conscience of the community. You're

really no different in this instance than people going to the polls to elect a representative. You're just exercising your judicial rights today if you think about it by way of a parallel. So, today is the day you-all are going to make a call and you're going to decide how things go, your decision. I think there's three questions in the case. I think two of them are easy. [449] I think one of them is hard. All right. Let's start with the easy ones. Elements of the offense, the defendant has to be convicted of a violent felony. That's easy right? You have a certified court document in front of you that's in evidence that shows he's convicted of breaking and entering. Jury instructions tell you that's a violent felony under the Code of Virginia. Easy, check, that should not be hard. That's not something that you necessarily need to spend a lot of time on. Element one, satisfied, and this is a lot like building a house, maybe, where, you know, you pour the foundation, you frame the walls, you build the roof. That's what the elements are to give you a parallel or an illustration. So, first issue, say I pour the foundation. Did he have a prior felony? Yes, easy, you shouldn't struggle with that at all. That shouldn't be in any way an issue. Second issue, which I think is also, it's a little more complicated, it's a little more difficult, but I think it resolves itself in a way that you-all probably will be able to wrap your arms around pretty quickly. Was it him? Was it him? Did he do this? What evidence do you have that it's him? Well, the evidence you have that it's him is essentially, I guess, threefold. All right? The first evidence that you have that it's him is the testimony of Bradley Wood. All right. I told you from the beginning, and I think I was right, you weren't going to like him. He's not [450] somebody that you're

going to have a great deal of warm feeling towards, understandable. But he does tell you, look, I engaged in these acts, these things happened and this is the person that did it with me. That's a piece of evidence for you to consider. You've got a cautionary instruction in there that tells you, you know, hey, be mindful about how you approach this, and you should be mindful. The guy is a convicted felon. He's here, he's pled guilty to, based on a plea agreement that's going to be before you, to breaking and entering and grand larceny and possession of a firearm by a violent felon. He's pled guilty to those things and he's got the prior that you're going to have in evidence in front of you and you should kick the tires on that, absolutely, but it's not just him that tells you that this is the person who engaged in this behavior. What else do you have? You've got the eyewitness testimony of the neighbor across the street, Ms. Sandridge, right? She's the second sort of layer and she really does it twice if you think about it. She does it first with respect to her identification through Detective Underwood, Officer Underwood, with the photo lineup. She picks him out and says, that's him. You have the photo lineup of eight photos (unintelligible). She picks him, he's number four, that's how that goes and she sits here in court today and says, yeah, that's the guy. Now, there are some limitations with her testimony [451] too, right? I mean, I'm not going to try and run away from that. Why should I run away from that? There's a bias there, right? Our neighbors want to be helpful. Our neighbors by definition want to be helpful. They want to be able to assist, right? Of course they do. There is a desire, I think, on her part to be helpful. You heard some, and Mr. Barnhardt and Ms. Sandridge sort of

got into a little kerfuffle (sic) there about two people, three people, light hair, beard, physical description of the driver versus physical description of the passenger. I think she's pretty consistent on that though. I think Mr. Barnhardt jostled her a little bit but at the end of the day, she's pretty clear. The guy sitting in the passenger seat is that guy and it's the same guy that I picked out of the photo lineup. It's not perfect, it's not A plus. Would you bet the mortgage on it? If somebody would come in and pay off your mortgage if she was right about that, would you bet the mortgage on it? Maybe you would, maybe you would. So, there's two layers, there's Mr. Wood, there's Ms. Sandridge. Another thing to consider, was it him? The third and probably the obviously most compelling piece of evidence was the first piece of evidence that you heard about right out of the box and that's from the folks from the lab in Richmond, right? They told you, and again, their evidence isn't perfect, Ms. Shenk was very clear about what her evidence was not. She didn't say, [452] this DNA belongs to that guy sitting in that chair. That's not what she says, so think about it as you process it. What she says is there's DNA on a cigarette butt. Where is that cigarette butt found? It's found in the bed of a pickup truck along with two other things. What were those two other things? Insulation and metal shavings, right? Insulation and metal shavings that were also found where? Just like I told you in opening statement, they were also found at the residence, correct? Those things are found in the bed of this pickup truck. What she tells you is the DNA off of that cigarette butt matches an entry that Ms. Grubb told you about in the DNA database that's connected to a conviction that's before you. We go back to that

first element. If you look at the date of conviction, it's the same as the date in the database entry with that person. It's not with 100% accuracy. There might be some wiggle room about, what if they made a mistake in the entry in the database? And that's all stuff for you to weigh and to consider but it's pretty good. Would you bet the mortgage about whether or not the DNA on that cigarette butt is that gentleman's DNA? I think you would, I think you would. Now, there are some obvious follow-up questions for that that you might have. You might think, well, gee, it's in the bed of a pickup truck. It's in the bed of a pickup truck. How do we know, what did Ms. Shenk tell us, you know? The DNA can [453] be there for a long time if there's exposure. Maybe they were in the pickup truck before, maybe it wasn't that day, it was some other day. Is that a reasonable conclusion in light of all the other evidence? Is that a reasonable conclusion to draw? Ask yourself that question. In light of the fact that Mr. Currier gets picked out of a photo lineup by Ms. Sandridge, in light of the fact that Mr. Wood stands here and says, Mr. Currier did these things with me, is the conclusion that, well, that cigarette butt may have just been there in an open bed pickup truck with no cover, where the only other things found in the truck are other items linked to the removal of that safe from that home, is suggesting that that DNA got there at some other time, that that cigarette butt got there at some other time, is that a reasonable conclusion? Ask yourself that question. So, that wraps up sort of element number two.

THE COURT: In regards to somebody sitting in the (unintelligible) section.

MR. QUATRARA: Thank you, Your Honor. I was just wanting to maybe check my zipper or something. With regards to the third element, and I think that's the hardest one. With regards to the third element, I think it's the hardest one. The third element, did he possess it? Did he possess the firearm? The jury instruction you're going to read that's in your stack, and I'm not going to read it to you, [454] you've already heard it and you can read it for yourselves in the back when you're making your decision, is that he has to have knowledge plus dominion and control essentially, knowledge that the item is there plus dominion and control. And I would suggest to you that if the evidence were them driving down the road with a locked safe and that's it, maybe that's a shaky case. Maybe you can draw the inference that it's a gun safe. Of course it's got guns in it, right? I mean, for anybody who's been around and been around firearms and knows what these big Liberty safes look like, and maybe you draw the inference, well, of course it's got guns in it, it's a gun safe. That might be a shakier case but that's not the case that's in front of you. The case that's in front of you is that ultimately, that safe gets opened. That safe gets opened and at that point does Mr. Currier, ask yourself this question, have knowledge of the firearms being there plus dominion and control over them? Now, what's the best in terms of quantity evidence that he had knowledge plus dominion and control? The best evidence unfortunately for the Commonwealth and unfortunately for you to have to wrestle with it comes from who, comes from Bradley Wood, right, because what does he say? He says oh, no, I didn't touch those firearms, right? You take that for what it's worth. You decide whether you believe that

or not, okay? But what he says about Mr. Currier's possession [455] is what? He takes the guns out and lays them down on the bed. He actually handles them and then they transport them, not a long distance, I'll readily concede that. I'm not going to sit there and tell you that this was, you know, Smokey and the Bandit transporting the, you know, transporting the firearms across state lines, but they transport them to the level that they're able to be put in the river. I submit to you that that safe can't be moved with one person, right? How do you know that? Because Mr. Garrison told you it weighs seven hundred (700) pounds. It took four guys to bring it into his house. I said five in opening statement by the way and my apologies, I was wrong about that. It took four guys to bring it into his house so you know at the point that they're transporting it, it's in the safe. The safe is open, right, and they're moving it. They've got the ability, no different than if it were a swinging door, to be able to go in there and have possession of them, and what the instruction tells you is that the length of time of possession is not material. It just doesn't matter. Now, whether you choose to believe Mr. Wood's lock step version of the events, that's up to you. You-all decide how you want to handle that, but we would suggest to you that the circumstantial case suggests that perhaps, based on your estimation, you could very readily find that he did have, Mr. Currier did have, knowledge plus dominion and control. It's [456] a sticking point and it's one you're going to have to wrestle with. So, I'm going to finish up by saying this. I'm grateful that you-all are here. It's 5:05, all right? I get to talk to you one more time on rebuttal. It will be brief, I promise you. This is your decision today. It's not mine, all right? It's not my

call, it's your call. You'll make the right decision. I just ask you to look at some of those points that we talked about and make a fair decision based on all of the evidence. Thank you very much.

* * *

[464:11]

[MR. BARNHARDT]: * * * I don't want to because I know Mr. Currier is probably cringing inside because I've got to say, all right, so let's assume that he was a part of this and then can he possess it? It's a very uncomfortable place to be in but I would submit to you that even if, even if you think that he might have been a part of this, what we have to say that he possessed firearms is only Bradley Wood, that's it. That's all we've got, so almost in that sense you can wipe away everything else in the case because you're focusing your case on possession of a firearm and you've got Bradley Wood to do that with. No, I don't think you can possess, you know, I would argue that you can't possess firearms when it's in a safe. You don't know what's in there. You don't have control over what's in there. So, that's not something I need to spend time on. The big moment is Bradley Wood [465] saying that Mr. Currier takes guns from a safe and puts them on a bed and so the safe is open if he's there, and we've got to do this horrible thing where we assume that that's the case and he knows about them. All right, so he's got knowledge that's where the guns are. And then look at the law. He's got to intentionally possess those guns and so that's the question you've got to ask yourself. Does somebody intentionally, does somebody want to possess firearms when those firearms remain in the safe? He takes them out and

they put them back in, whoever it was, but at the end of the day no firearms were ever found on Mr. Currier. It's an unusual case. No firearms are found on him at all and the firearms are where they actually always had been. It's just that the safe is in another place. So, does somebody intentionally want to possess firearms when they never take the firearms away for themselves and do whatever they want with them? They stay in the safe. To me that sounds like they do not want—they have no intention to possess those firearms. You heard Bradley Wood say that. So even if you think that Mr. Currier had something to do with Bradley Wood and his stealing from his family, you still have to ask yourself, so did he—did they really intend to take these firearms, possess these firearms, when they were just simply put in, they stayed in the safe.

* * *

[467:5]

[REBUTTAL]

[MR. QUATRARA]: Mr. Currier's DNA is found in a truck next to evidence suggesting that a safe containing twenty (20) firearms was broken into. That's the physical evidence before you. Length of time of possession is not relevant. That's the law that's before you.

* * *

[VA S. CT JA: 530]

Instruction No. *10*

To knowingly and intentionally possess a firearm means that a person is aware of the presence and character of the firearm and has actual physical possession or constructive possession. Constructive possession means that the person has dominion or control over the firearm. Mere proximity is not enough.

Possession need not be exclusive; it may be shared with another. The length of time of the possession is not material.

Ownership or occupancy of the premises or vehicle in which a firearm is found does not create a presumption that the owner or occupant either knowingly or intentionally possessed such firearm. Such ownership or occupancy is a fact which may be considered with other evidence.

Possession may be proved by acts, declarations or conduct of the defendant from which it may be fairly inferred that he was aware of the presence and character of the firearm at the place found *and was intentionally and consciously aware of it.*

Given
3-11-2014
[illegible]
Judge

[VA S. CT JA: 531]

Instruction No. *11*

The defendant is charged with the crime of possessing or transporting a firearm after having been convicted of a violent felony. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant knowingly and intentionally possessed or transported a firearm; and

(2) That the defendant had been previously convicted of Breaking and Entering.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of offense as charged, then you shall find the defendant guilty of possession of a firearm after having been convicted of a violent felony, to wit, Breaking and Entering, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

Given
3-11-2014
[illegible]
Judge

JURY VERDICT ON GUILT, filed March 11, 2014

[VA S. CT JA: 532]

Instruction No.

We the jury find the defendant guilty of possession of a firearm after having been convicted of a violent felony as charged in the indictment.

Michael Brown
Foreperson

[Expunged Text]

OR

We the jury find the defendant not guilty.

_____
Foreperson

* * *

COURT REPORTER'S TRANSCRIPT
July 29, 2014

Commonwealth of Virginia v. Michael Nelson Currier

Case No. 1428-14-2

Transcript of the proceedings taken in the Circuit Court for the County of Albemarle, Virginia at the July 29, 2014, Criminal Session, before the Honorable Cheryl V. Higgins, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

SENTENCING HEARING

* * *

[488:3]

THE COURT: So, here are the observations of the Court. I agree with counsel. There are two separate issues for the Court to address and one is the procedural issue and one is the substantive issue of the four elements. And I agree with Mr. Quatrara that that last element about the essential—give me just a moment, I want to read it, that the factual issue must have been essential to the judgment rendered in the prior proceeding. And I do find that there is a strong argument, much different than in *Walker*, that the guns being accessed by Mr. Currier were, in fact, part of the essential issue in the grand larceny charge. The larceny was of the safe. The testimony was the guns were in the safe. I believe there was testimony that the

guns were found in the creek and I find that the connection between the larceny, the guns, and the safe act as one final essential element. If they found him guilty of the safe, they found him guilty of the guns. If they didn't find him guilty of the safe, they didn't find him guilty of the guns. But that does not end this Court's inquiry. The whole purpose for collateral estoppel is actually a Fifth Amendment protection and I believe that the Court noted in the *Walker* matter that collateral estoppel is a doctrine, a fact preclusion imbedded in the Fifth Amendment protection against [489] double jeopardy. But in this particular case, this setting of the case subsequent is in a much different position because, as Mr. Quatrara stated, it would have been error and reversible error, not even harmless error for the Court not to set the matters subsequently. That is required by law and because this is not an attempt by the government to infringe upon his Fifth Amendment protection against double jeopardy, but rather to protect the defendant from being penalized by a jury because they're aware of felonies that they shouldn't otherwise be aware of, I find that the collateral estoppel argument fails under this fact pattern and it is on that basis that I deny your motion, Mr. Barnhardt. Your exception to the Court's ruling is noted.

* * *

No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

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BRIEF FOR PETITIONER

Petitioner Michael N. Currier respectfully requests that this Court reverse the judgment of the Virginia Supreme Court.

OPINIONS BELOW

The order of the Virginia Supreme Court (Pet. App. 1a) is published at 798 S.E.2d 164. The opinion of the Virginia Court of Appeals (Pet. App. 2a) is published at 779 S.E.2d 834. The relevant orders of the trial court (J.A. 50-51, 100-01) are unpublished.

JURISDICTION

The Virginia Supreme Court entered its judgment on December 8, 2016. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on May 8, 2017, which this Court granted on October 16, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."

STATEMENT OF THE CASE

1. In March 2012, a large safe containing approximately $71,000 in cash and twenty firearms was stolen from the home of Paul Garrison II in Albemarle County, Virginia. A few days later, police recovered the safe from a nearby river. It had been forcibly opened. All twenty firearms remained in the safe, but most of the cash was gone.

A neighbor reported that she had seen a pickup truck leaving the Garrison residence around the time of the theft. The police linked that truck to Garrison's nephew, Bradley Wood. Executing a warrant to search Wood's truck, the police found metal shavings and insulating material in the truck's bed. These items appeared to match materials collected from the floor of the Garrison residence, near where the safe had been. The police also collected a cigarette butt from the bed of the truck.

The Commonwealth of Virginia charged Wood with the theft. After initially denying his involvement, he pleaded guilty. Hoping for a more lenient sentence, Wood began cooperating with the police and at first implicated his cousin as an accomplice. *See* Va. Ct. of Appeals Jt. App. ("VA Jt. App.") 188, 228-29. The detective, however, believed that Wood was lying and declined to pursue charges against the cousin. *See id.* 189-90. Wood then claimed instead that petitioner had participated in the theft. The two men had met in prison and had sold firewood together after their release. J.A. 77, 83-84.

2. The Commonwealth indicted petitioner on three charges: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after having been convicted of a felony. Pet. App. 4a. The firearm

charge was based on the theory that he briefly "handle[d]" the guns inside the safe and "la[id] them down on the bed" of the truck so that the cash could be removed. J.A. 94.

In Virginia, as elsewhere, "evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial" and generally "inadmissible." *Hackney v. Commonwealth*, 504 S.E.2d 385, 388 (Va. Ct. App. 1998) (en banc). Therefore, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Id.* at 389.

That rule applied here. *See* Pet. App. 9a. The felon-in-possession charge required the Commonwealth to introduce evidence regarding petitioner's criminal history, which included convictions for breaking and entering and grand larceny, VA Jt. App. 509, 513. Yet mentioning petitioner's prior convictions while trying him for the break-in and theft at the Garrison residence would have invited the jury to impermissibly infer guilt based on his past conduct. The Commonwealth, therefore, "was not even in a position where [it] could consider trying these charges simultaneously." J.A. 51 (trial court decision).

Recognizing that "it would be 'reversible error' to try the felon in possession of a firearm charge together with the other charges," the Commonwealth requested severance. J.A. 47; *see also id.* 48. Petitioner agreed, Pet. App. 9a, and the trial court severed the felon-in-possession charge from the other two charges, J.A. 47.

3. The Commonwealth elected to try petitioner first for breaking and entering and grand larceny. It offered two primary strands of evidence. First, Wood testified that petitioner broke into the Garrison residence and stole the safe with him. J.A. 23. Second, the neighbor testified that she saw petitioner riding as a passenger in the pickup truck as it was leaving the Garrison residence. VA Jt. App. 206. The Commonwealth also attempted to introduce evidence that the cigarette butt recovered from the bed of the pickup truck carried petitioner's DNA. But the court excluded this evidence because the prosecution violated Virginia law by failing to disclose it at least twenty-one days before trial. Letter Order at 2, Sept. 12, 2013; *see also* Va. Code § 19.2.270.5.

Both sides agreed that the sole issue for the jury to decide was whether petitioner was involved in stealing the safe. In his closing remarks to the jury, the prosecutor asked: "What is in dispute? Really only *one issue and one issue alone.* Was the defendant, Michael Currier, one of those people that was involved in the offense?" J.A. 35 (emphasis added). The defense maintained that petitioner "did not participate at all" in the crimes. Trial Tr. 89 (defense's opening statement). It attacked the weaknesses in the Commonwealth's evidence and warned the jury that "[u]nreliable testimony is how innocent people go to jail." J.A. 44.

The jury acquitted petitioner of both charges concerning the theft of the safe. Pet. App. 4a.

4. Following this acquittal, the Commonwealth insisted on pressing ahead with the felon-in-possession prosecution.

In response, petitioner invoked the issue preclusion component of the Double Jeopardy Clause, which "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). Specifically, petitioner contended that the first jury in its acquittal had necessarily determined that he was not involved in the break-in and theft. VA Jt. App. 9. Accordingly, he moved to preclude the prosecution from introducing at the second trial any evidence of his alleged involvement in the break-in and theft at the Garrisons' home. VA Jt. App. 11; *see also* Pet. App. 5a.

In a second motion, petitioner argued that if the Double Jeopardy Clause precluded the prosecution from alleging that he stole the firearms, the trial court should dismiss the felon-in-possession charge outright. Petitioner contended that without any evidence that he helped to steal the safe containing the guns from the Garrisons' home, the prosecution lacked sufficient evidence to support its claim that he had possessed any firearms at all. VA Jt. App. 11; *see also* Pet. App. 5a.

The trial court denied the first motion—and therefore necessarily the second as well. Pet. App. 5a. The court described the issue preclusion doctrine as "designed to prevent the Commonwealth from subjecting the accused to the hazards of vexatious multiple prosecutions." J.A. 51. It observed that the Commonwealth had not sought separate trials for the purpose of harassing petitioner; to the contrary, "[i]t would have been prejudicial to the defense" to have tried the charges together. *Id.* Consequently, the

court held that that the acquittal at petitioner's first trial should not be given issue-preclusive effect. *Id.*

The case then proceeded to the second trial, on the felon-in-possession charge. The Commonwealth again sought to prove that petitioner broke into the Garrisons' home and helped steal the safe containing the firearms. *See, e.g.*, J.A. 64-68, 76-80 (Bradley Wood's testimony); *id.* 64-68 (neighbor's testimony); *id.* 88-91 (prosecution's closing statement). As the prosecutor explained to the trial judge, it would have been "impossible for the jury to understand how we get a safe in the river without the—and how we connect Mr. Currier to the safe in the river without that prior, that prior involvement there in the house." *Id.* 57.

At the same time, the Commonwealth modified its presentation at the second trial in two ways. First, the Commonwealth's key witnesses refined their testimony and redelivered it with greater poise. For example, the Garrisons' neighbor had testified at the first trial that she "didn't suspect anything" when she saw the pickup truck leaving the house. J.A. 16. At the second trial, however, she testified that she had seen the safe in the back of the truck as it left the house, and even specified that she "could see the knob" on the safe. *Id.* 72-73. And at the second trial, Wood anticipated and preemptively denied the defense's suggestion that he had accused petitioner of participating in the theft because they had had a falling out. *Compare id.* 31-32, *with id.* 83-84. Having already undergone cross-examination once, Wood told petitioner's attorney: "I know where this story is going . . . . [I]t's the same story you used last time." *Id.* 83-84. Second, the Commonwealth corrected its procedural error from the first trial by successfully

introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that petitioner had at some point been in Wood's truck (though not necessarily on the day of the theft). *See* VA Jt. App. 480-81.

Finally, to prove the "felon" element of the felon-in-possession charge, the Commonwealth told the second jury—unlike the first—about petitioner's prior convictions. *See* J.A. 89; VA Jt. App. 509, 513.

The second jury found petitioner guilty and sentenced him to five years in prison. Pet. App. 5a.

Petitioner moved to set aside the verdict on double jeopardy grounds, renewing his issue preclusion argument. Pet. App. 5a. The trial court acknowledged that the jury in the first trial had necessarily rejected the theory the Commonwealth renewed in the second trial: "If they didn't find him guilty of the safe, they didn't find him guilty of the guns." J.A. 101. The court, however, denied petitioner's motion. It reasoned—as it had in its pretrial order—that issue preclusion was unavailable because the second trial had not been "an attempt by the government to infringe upon [petitioner's] Fifth Amendment protection against double jeopardy, but rather to protect" petitioner from undue prejudice. *Id.*

5. The Virginia Court of Appeals affirmed. Pet. App. 2a. It noted that courts have split over whether a defendant may invoke issue preclusion "when [he] has obtained severance of the charges against him and the first trial results in an acquittal." *Id.* 10a n.2 (citing several decisions on each side of the conflict). The court of appeals sided with those courts that have held that defendants may not, under these circumstances, invoke issue preclusion.

The court of appeals offered two reasons for this holding. First, it quoted *Ohio v. Johnson*, 467 U.S. 493 (1984), for the proposition that the Double Jeopardy Clause is not violated unless "'prosecutorial overreaching' is present." Pet. App. 8a-9a (quoting *Johnson*, 467 U.S. at 501). Although *Johnson* concerned only the right against multiple trials, the court of appeals assumed that the limitation it deduced from that case also applies to the distinct double jeopardy right to the issue-preclusive effect of an acquittal. *See id.* 9a-10a. And the court of appeals saw no prosecutorial overreaching in this case because "[t]he point of separate trials here was to *benefit* the defendant by avoiding the undue prejudice that would occur upon the mention of the defendant's felonious past to the jury." *Id.* 9a.

As a secondary rationale, the court of appeals suggested that petitioner waived his right to issue preclusion because the severance here occurred "with [his] consent." Pet. App 10a; *see also id.* at 11a n.2 (phrasing question presented in terms of whether defendants in this position "waive [their] right to assert" the right to issue preclusion). Applying issue preclusion under these circumstances, the court of appeals suggested, would have unfairly deprived the Commonwealth of a full opportunity to prove all of its allegations. Pet. App. 9a.

6. The Virginia Supreme Court granted discretionary review and affirmed. Pet. App. 1a. In lieu of writing an opinion, the court issued a published order adopting as its own "the reasons stated in the opinion of the Court of Appeals." *Id.*

SUMMARY OF ARGUMENT

Petitioner did not lose his double jeopardy right to the issue-preclusive effect of an acquittal by consenting to severance of the charges against him.

I. The Virginia Court of Appeals concentrated its analysis on a case involving the double jeopardy right against multiple trials, *Ohio v. Johnson*, 467 U.S. 493 (1984). But this case involves a different right: the right to issue preclusion. Whereas the right against multiple trials guards against the mere fact of a successive trial (regardless of the outcome of the first trial), the right to issue preclusion protects the integrity of a prior acquittal. And as its very name suggests, the doctrine of issue preclusion does not necessarily bar a successive trial. The doctrine simply precludes "relitigating any *issue* that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009) (emphasis added).

II. In light of issue preclusion's distinct foundation and consequences, this Court has thrice held that a defendant may invoke that right "irrespective of the good faith of the State in bringing successive prosecutions." *Harris v. Washington*, 404 U.S. 55, 56-57 (1971) (per curiam); *accord Yeager*, 557 U.S. at 118, 122-23; *Turner v. Arkansas*, 407 U.S. 366, 367, 370 (1972) (per curiam). This is because an acquittal is inviolate—regardless of whether there is any prosecutorial overreaching.

Issue preclusion is also available regardless of whether a defendant consents to having separate trials. The Commonwealth asserts that *Jeffers v. United States*, 432 U.S. 137 (1977), dictates a finding of waiver under these circumstances. But *Jeffers*—

like *Johnson*—involved only the right to multiple trials. Specifically, it held that a defendant who requests separate trials necessarily waives the protection against multiple trials because the former and the latter are mutually exclusive. That reasoning does not apply to this case. There is no inconsistency between preferring separate *trials* and later seeking to prevent the government from relitigating an *issue* resolved against it at the first trial.

At the very least, equitable considerations dictate that where, as here, defendants consent to severance to avoid undue prejudice, they should not be deemed to relinquish their right to issue preclusion. Evidence of prior convictions is highly prejudicial. Accordingly, defendants facing multiple charges, only one of which permits the prosecution to introduce evidence of their prior convictions, have no real choice but to accept severance. On the other hand, the prosecution is not prejudiced when defendants who have assented to severance retain their right to issue preclusion. Issue preclusion extends only to issues that the prosecution has fully litigated and that were necessarily decided against it. So in a case such as this one, the prosecution is not deprived of a full and fair opportunity to prove all of its allegations.

ARGUMENT

In its resolution of the question presented, the Virginia Court of Appeals treated two strands of double jeopardy law—the right against multiple trials and the right to issue preclusion—as interchangeable. *See* Pet. App. 6a-10a. Those rights, however, are conceptually distinct. And once the distinct purposes and effects of issue preclusion come

into focus, it becomes apparent that a defendant does not lose that right where, as here, charges are severed "with the defendant's consent and for his benefit," *id.* 10a.

I. Issue preclusion and the right against multiple trials are different double jeopardy rights.

1. The Double Jeopardy Clause of the Fifth Amendment (applicable to the states through the Fourteenth Amendment) protects the accused from being "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 796 (1969). By preventing the prosecution from "mak[ing] repeated attempts to convict an individual for an alleged offense," the Clause serves as a bulwark between the individual and "the State with all its resources and power." *Green v. United States*, 355 U.S. 184, 187 (1957). In particular, the double jeopardy guarantee spares the accused from the "embarrassment, expense and ordeal" of "liv[ing] in a continuing state of anxiety and insecurity," as well as from the "enhanc[ed] possibility that even though innocent he may be found guilty." *Id.* at 187-88.

The Clause effectuates its overall guarantee through multiple distinct protections. One such protection is the right against multiple trials for the same offense. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977). Another is the right to the issue-preclusive effect of an acquittal. *See, e.g.*, *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 (2016); *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).

The right against multiple trials is a form of claim preclusion: it instructs that a "final judgment on the merits foreclos[es] successive litigation of the

very same claim"—or, in the parlance of criminal law, the same charge. *Bravo-Fernandez*, 137 S. Ct. at 357 (alteration in original) (quotation marks and citation omitted). The question whether two charges are considered the same for the purposes of the right against multiple trials depends exclusively on the formal elements of the two charges: if each of the two charges contains an element the other lacks, the prosecution may try a defendant a second time. *See, e.g., Blockburger v. United States*, 284 U.S. 299, 304 (1932). But if one charge is a lesser-included offense of the other, the defendant is entitled to limit the prosecution to a single trial. *See Brown*, 432 U.S. at 166. For example, the right against multiple trials protects a defendant who has been tried and convicted of second-degree murder from subsequently being tried for first-degree murder of the same victim.

While the right against multiple trials provides complete protection when applicable, it applies only in rare circumstances. "[W]ith the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses," prosecutors can "spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. So long as each charge has one element the others lack, the right against multiple trials does not bar a successive prosecution based on the same underlying conduct—even after a defendant has been acquitted.

This is where issue preclusion (sometimes called collateral estoppel) comes into play. *See Bravo-Fernandez*, 137 S. Ct. at 356 & n.1. As Judge Friendly explained, "to permit the Government to force a defendant *who has won an acquittal* to

relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment." *United States v. Kramer*, 289 F.2d 909, 916 (2d Cir. 1961) (emphasis added).

In contrast to the right against multiple trials, which operates with respect to *charges*, the double jeopardy right to issue preclusion prevents the prosecution from rearguing *issues* that a jury has already decided in the defendant's favor at a prior trial. *See Bravo-Fernandez*, 137 S. Ct. at 358. Looking beyond the formal elements of each charge, the rule turns on the contentions the parties advanced, and the evidence they presented, at the first trial. *Ashe*, 397 U.S. at 444. It "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009) (citing *Ashe*, 397 U.S. 436).

2. Like the right against multiple trials, the right to issue preclusion is designed in part to prevent "unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10; *see also Ohio v. Johnson*, 467 U.S. 493, 502 (1984). But the issue preclusion doctrine's focus on preserving the integrity of acquittals distinguishes it from the right against multiple trials.

The right against multiple trials can be triggered regardless of "whether in the former trial [the defendant was] acquitted or convicted." *Green*, 355 U.S. at 187 (quotation marks omitted); *see also, e.g.*, *Brown*, 432 U.S. at 168-69. This is because the harm

that right seeks to prevent is the mere fact of having to stand trial a second time. The issue preclusion doctrine, by contrast, can spring only from an acquittal, such as occurred here. The doctrine is designed to prohibit relitigation of prosecutorial allegations that a jury has already rejected.

Protecting the integrity of acquittals is an interest of the highest order. As this Court has noted time and again, "the law attaches particular significance," *United States v. Scott*, 437 U.S. 82, 91 (1978), and "special weight" to acquittals, *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Once a defendant has been acquitted, the Government cannot appeal. *United States v. Ball*, 163 U.S. 662, 671 (1896). Indeed, the finality of an acquittal is "unassailable," *Yeager*, 557 U.S. at 122-23, and "absolute," *Burks v. United States*, 437 U.S. 1, 16 (1978). Even when an acquittal results from a trial court's mistakenly dismissing charges or granting a midtrial motion, the Double Jeopardy Clause insists that it remain inviolate. *See Evans v. Michigan*, 568 U.S. 313, 324 (2013) (dismissal); *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978) (midtrial motion); *see also Green*, 355 U.S. at 188 ("[I]t is one of the elemental principles of our criminal law" that an acquittal cannot be disturbed, even if it "may appear to be erroneous.").

The Double Jeopardy Clause's special respect for acquittals is rooted in the inherent disparity between the Government, "with all its resources and power," and individual criminal defendants. *Green*, 355 U.S. at 187. If the Government were allowed a second opportunity to litigate issues after an acquittal, it would "gain[] an advantage from what it learn[ed] at the first trial about the strengths of the defense case

and the weaknesses of its own." *DiFrancesco*, 449 U.S. at 128. This would create "an unacceptably high risk" that the prosecution—even if acting in the utmost good faith—"might wear down the defendant so that 'even though innocent he may be found guilty.'" *See Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188).

The need to accord special solicitude to acquittals is also tied to the importance of the right to trial by jury. The use of juries in criminal cases embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Juries "function as circuitbreaker in the State's machinery of justice," ensuring that the criminal justice system is one "of limited state power." *Blakely v. Washington*, 542 U.S. 296, 306, 313 (2004); *see also United States v. Powell*, 469 U.S. 57, 65 (1984). A jury's verdict of acquittal thus "represents the community's collective judgment" that the prosecution has failed to prove its allegations, *Yeager*, 557 U.S. at 122—a judgment that is owed unconditional respect, lest the citizenry lose faith in the fairness of the system.

3. Issue preclusion also produces consequences that are distinct from those that flow from the right against multiple trials. As its very name suggests, issue preclusion—unlike the right against multiple trials—does not necessarily bar a successive prosecution. *See Yeager*, 557 U.S. at 125-26. This basic principle accords with the right's common-law analog, which "do[es] not purport to prohibit litigation of matters that have never been argued or decided." 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4416, at 424 (3d ed. 2016);

see also Restatement (Second) of Judgments § 27, at 256 (1982). If a defendant who has been acquitted "fail[s] to show that the jury necessarily resolved in his favor an issue of ultimate fact that the Government must prove in order to convict him" at a second trial on new charges, the second trial may proceed. *Yeager*, 557 U.S. at 125.

To be sure, in some cases the arguments and evidence presented at a first trial are so closely aligned with allegations in a second indictment that, as a practical matter, the issue-preclusive effect of an acquittal at the first trial prohibits a second trial. *Ashe* is an example of this phenomenon. There, a group of men robbed six poker players. 397 U.S. at 437. The State first tried the defendant for robbing one of the players, and he was acquitted. The State then charged the defendant with robbing a second player. *Id.* at 438-40. Scrutinizing the arguments and evidence presented at the first trial, this Court concluded that the jury necessarily decided that Ashe was not "one of the robbers." *Id.* at 445. Consequently, the issue preclusion doctrine barred the State from relitigating that issue at a second trial. And because the State lacked sufficient evidence to support any alternative theory, a second prosecution for the robbery of another poker player was "wholly impermissible." *Id.*

But not every case is like *Ashe*. In many cases, issue preclusion does not bar a second trial at all; the prosecution can press ahead on any theory that the jury in the first trial did not necessarily reject. *See, e.g.*, *Joya v. United States*, 53 A.3d 309, 323 (D.C. 2012); *Jackson v. State*, 183 So. 3d 1211, 1215 (Fla. Dist. Ct. App. 2016). For example, suppose a defendant were charged with assault based on the

theory that he fired a gun at the victim. If he admitted owning and firing the gun and presented only a self-defense theory, an acquittal would bear issue-preclusive effect: the prosecution would be barred from relitigating the issue of whether the defendant was justified in shooting the victim. But the preclusive effect of the acquittal would not bar a second trial for felon-in-possession of a firearm. The prosecution would be free to press forward on the theory that the defendant owned the firearm that he used during the altercation.

II. Defendants do not lose their right to issue preclusion when they consent to severance.

As a general matter, defendants may invoke issue preclusion whenever they have been acquitted and the prosecution seeks to retry them on another charge arising from the same events. But in the opinion that the Virginia Supreme Court adopted here, Pet. App. 1a, the Virginia Court of Appeals held that the right to issue preclusion cannot be invoked where criminal charges are "severed with the defendant's consent and for his benefit." *Id.* 10a.

This holding is incorrect. An acquittal's issue-preclusive effect does not depend on whether severance occurred for the defendant's benefit—or otherwise in the absence of prosecutorial overreaching. And a defendant's consent to severance does not waive his right to rely on the issue-preclusive effect of a prior acquittal. Accordingly, this Court should reverse the judgment of the Virginia Supreme Court and remand for an application of the issue preclusion doctrine to the facts of this case.

A. An acquittal retains its issue-preclusive effect regardless of whether sequential trials result from prosecutorial overreaching.

The Virginia Court of Appeals correctly noted that the right to the issue-preclusive effect of an acquittal, like other double jeopardy rights, is designed in part to "prevent[] prosecutorial abuse and overreaching." Pet. App. 7a. But the court of appeals erred in holding that issue preclusion applies *only* when the prosecution acts in bad faith in seeking a second trial. The Double Jeopardy Clause's insistence upon safeguarding the finality of acquittals requires the availability of issue preclusion, regardless of prosecutorial motives.

1. This Court has squarely and repeatedly held that the issue-preclusive effect of an acquittal does not depend on whether prosecutorial overreaching causes sequential trials. This principle was first established in two cases decided shortly after *Ashe*: *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), and *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam). And it was recently reinforced in *Yeager v. United States*, 557 U.S. 110 (2009).

In *Turner*, Arkansas prosecutors believed the defendant had murdered and robbed someone. 407 U.S. at 366-67. Yet an Arkansas statute prohibited jointly trying a defendant for murder and any other offense. *Id.* at 367. Like the Virginia rule requiring severance here, this Arkansas statute was designed to benefit the defense—to keep it from suffering

undue prejudice at a single trial on multiple charges.[1] So the State first tried Turner for murder, and a jury acquitted. The State then sought to try him for robbery. Even though state law—*not* an overzealous prosecutor—dictated these sequential trials, this Court held that the case was "squarely controlled by *Ashe*" and that the defendant was entitled to assert issue preclusion. *Id.* at 370.

Harris is in accord. In that case, the Washington Supreme Court held that *Ashe* did not apply because there was "no indication of bad faith of the state in deliberately making a 'trial run' in the first prosecution." *State v. Harris*, 480 P.2d 484, 488 (Wash. 1971). Indeed, "it was to the advantage of the defendant, and not the state, to separate the trials" because certain evidence was inadmissible in the first trial that was admissible in the second. *Id.* But this Court reversed. An acquittal has issue-preclusive effect, the Court explained, "irrespective of the good faith of the State in bringing successive prosecutions." *Harris*, 404 U.S. at 56-57.

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[1] The anti-joinder statutes applied in *Turner*, Ark. Stat. Ann. §§ 43-1009, -1010 (Repl. 1964), were rooted in a common law rule requiring all criminal charges to be indicted and tried separately. Robert A. Leflar, *The Criminal Procedure Reforms of 1936—Twenty Years After*, 11 Ark. L. Rev. 117, 127-28 (1957); *see also* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 343 (1956) ("[A]t common law an indictment could charge only a single felony . . . ."). That limitation was intended to aid defendants, "lest [joinder] should confound the prisoner in his defence, or prejudice him in his challenge to the jury." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 252-53 (1836).

The Court held yet again in *Yeager* that issue preclusion is available regardless of whether the prosecution seeks sequential trials. The defendant in that case stood trial on several factually related charges. 557 U.S. at 113-14. The jury acquitted on some counts but hung on others. The defendant then faced retrial on some of the hung counts. *Id.* at 115. When he argued that issue preclusion should apply at the second trial, the Government responded that retrial "present[ed] 'none of the governmental overreaching that double jeopardy is supposed to prevent.'" Brief for the United States at 26, *Yeager*, 557 U.S. 110 (No. 08-67) (quoting *Ohio v. Johnson*, 467 U.S. 493, 502 (1984)). The Government stressed that it had "attempted to bring all the charges in a single proceeding, but it was forced to retry some of the charges because the jury hung." *Id.*

This Court was unmoved. Consistent with *Turner* and *Harris*, it held that the "vitally important interest[]" in the finality of acquittals—regardless of their perceived fairness or accuracy—is alone sufficient to trigger the issue preclusion doctrine. *Yeager*, 557 U.S. at 117; *see also id.* at 122-23. The Court recalled that our criminal justice system is built on the premise that "[a] jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." *Id.* at 123. Defendants may invoke issue preclusion whenever they face a second trial following an acquittal, regardless of prosecutorial overreaching. *See id.* at 122-23.

2. The Virginia Court of Appeals did not mention *Turner* or *Harris*, and it did little more than recite the specific holding of *Yeager*. *See* Pet. App. 10a. Instead, it construed *Ohio v. Johnson*, 467 U.S. 493

(1984), to dictate that issue preclusion is unavailable in the absence of prosecutorial overreaching. Pet. App. 8a-9a. *Johnson*, however, poses no impediment to applying the issue preclusion doctrine here.

a. *Johnson* is inapposite because it involved the right against multiple trials, not the right to the issue-preclusive effect of an acquittal. Indeed, Johnson was not acquitted at all.

In *Johnson*, the defendant was charged in a single indictment with murder and aggravated robbery as well as lesser-included offenses. 467 U.S. at 494. Over the prosecutor's objection, the defendant pleaded guilty to the two lesser-included offenses. *Id.* He then argued that his double jeopardy right against multiple trials for the same offense precluded the prosecution from trying him on the two greater charges. *Id.* This Court disagreed, explaining that "[n]o interest . . . protected by the Double Jeopardy Clause [wa]s implicated by continuing prosecution on the remaining charges." *Id.* at 501. Most pertinent here, the Court stressed that because Johnson had pleaded guilty to the initial charges, the case did not implicate the interest in the finality of an acquittal. *Id.* at 501-02.

Here, by contrast, petitioner secured an acquittal in his initial trial. And unlike the defendant in *Johnson*, petitioner is not attempting to prevent the Commonwealth from trying him for all the offenses with which he has been charged. That is, petitioner makes no claim that the Double Jeopardy Clause should have prevented his second trial as such. Rather, petitioner argues merely that the Clause's issue preclusion component barred the Commonwealth from convincing the second jury of factual

allegations it had already tried and failed to prove at the first trial.

Under these circumstances, *Turner*, *Harris*, and *Yeager*—not *Johnson*—control. Indeed, as the *Johnson* Court itself recognized, "the principles of collateral estoppel applied in *Ashe* ha[d] no relevance" in that case. 467 U.S. at 497 n.6 (internal citation omitted).

b. The Commonwealth also points to a footnote of dicta in *Johnson*. *See* BIO 27. Even though *Johnson* did not involve issue preclusion, the footnote states without citation or elaboration that "in a case such as [*Johnson*], where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Johnson*, 467 U.S. at 500 n.9. The language cannot bear the weight the Commonwealth places on it.

As an initial matter, nothing in *Johnson*'s footnote abrogated the prior holding in *Turner* that issue preclusion is available where—as here—state law creates the need for separate trials. *See supra* at 20-21. In *Johnson*, the defendant alone insisted that the charges be tried separately—and the trial court granted that request "[o]ver the State's objection." *Johnson*, 467 U.S. at 496. That is a far cry from the situation in *Turner* and this case, where the prosecution agreed that separate trials were necessary to comply with state law. J.A. 101. Thus, whatever exactly the *Johnson* footnote meant with respect to "a case such as [*Johnson*]," 467 U.S. at 500 n.9, the footnote cannot apply here.

Lest there be any doubt, the Commonwealth's reading of the dictum in *Johnson* as "control[ling]"

here, BIO 27, is impossible to square with this Court's subsequent decision in *Yeager*. There, Justice Scalia expressly referenced the *Johnson* footnote in dissent, advancing it for the proposition that the defendant could not assert issue preclusion because the prosecution had not caused the multiple trials. 557 U.S. at 131 (Scalia, J., dissenting). But the majority rejected his position. It held that the Double Jeopardy Clause's interest in preserving the finality of acquittals bars the prosecution from relitigating issues a jury decided against it, even if no prosecutorial overreaching created the need for a second trial. *See id.* at 118, 122-23. That holding governs here.

B. There is no waiver of the right to issue preclusion under the circumstances here.

This Court has observed that the term "waiver" can refer to a "great variety" of things. *Green v. United States*, 355 U.S. 184, 191 (1957). Only one of its multiple meanings is at issue here. The Commonwealth makes no claim that petitioner expressly renounced his right to issue preclusion, *see Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Nor does it contend that he "fail[ed] to make the timely assertion of [the] right," *see United States v. Olano*, 507 U.S. 725, 733 (1993). Instead, the Commonwealth asserts that petitioner, *through his conduct*, implicitly surrendered his right to the issue-preclusive effect of the first jury's acquittal. BIO 27, 29.

The Commonwealth is mistaken. Consenting to severance does not waive the right to issue preclusion. This is especially so where, as here,

severance is necessary to avoid undue prejudice to the defense.

1. Consenting to separate trials does not waive the issue-preclusive effect of an acquittal.

According to the Commonwealth, the plurality opinion in *Jeffers v. United States*, 432 U.S. 137 (1977), dictates that when defendants agree to separate trials, they waive their right to issue preclusion. BIO 27. The Commonwealth, however, seriously misconstrues *Jeffers*. That case—like *Johnson*—concerns only the right against multiple trials. And the *Jeffers* plurality's reasoning does not carry over to the right to the issue-preclusive effect of an acquittal.

Indeed, two of the Justices in the *Jeffers* plurality (including its author) explicitly acknowledged as much. In a later writing, these Justices explained: "There is no doubt that had the defendant in *Jeffers* been acquitted at the first trial, the collateral-estoppel provisions embodied in the Double Jeopardy Clause would have" applied. *Green v. Ohio*, 455 U.S. 976, 980 (1982) (White, J., joined by Blackmun & Powell, JJ., dissenting from the denial of certiorari).

a. Waiver analysis proceeds on a right-by-right basis; a defendant who waives one constitutional right—even one double jeopardy right—does not necessarily waive another. *See, e.g., Burks v. United States*, 437 U.S. 1, 17 (1978) (even if a defendant waives the right against multiple trials by requesting a retrial, he does not also waive the right to the finality of an acquittal). It is thus critical to focus in any waiver case on exactly what right is at stake.

In *Jeffers*, the defendant was charged with two offenses, one of which was a lesser-included offense of the other. He "expressly ask[ed]" for separate trials on these charges. 432 U.S. at 152; *see also id.* at 142-43. At his first trial, Jeffers was convicted on one charge. *Id.* at 143. He then argued that a second trial on the remaining charge would violate his double jeopardy right "against multiple prosecutions." *Id.* at 150; *see also id.* at 144. A plurality of this Court rejected this argument, holding that Jeffers had waived that right because he was "solely responsible for the successive prosecutions." *Id.* at 152.[2]

That is as far as *Jeffers* goes. The opinion says nothing about issue preclusion. Jeffers was not even acquitted at his first trial. Thus, even if a defendant in petitioner's position waives the right *against multiple trials* when he consents to severance, *Jeffers* does not establish that this consent also relinquishes the distinct double jeopardy right *to the issue-preclusive effect of an acquittal.* The latter question must be analyzed on its own terms.

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[2] Four justices disagreed that Jeffers was in fact solely responsible for the separate trials, 432 U.S. at 159 (Stevens, J., dissenting in part and concurring in the judgment in part), and the final Justice did not reach the issue. But no Justice disputed that a defendant who *is* solely responsible for causing multiple trials on greater and lesser-included offenses waives his right to have those offenses tried together. And subsequent cases treat *Jeffers* as having established this general principle. *See Rutledge v. United States*, 517 U.S. 292, 303 (1996); *Sanabria v. United States*, 437 U.S. 54, 75-76 (1978).

Unless otherwise noted, all citations in this brief to *Jeffers* are to the plurality opinion.

b. Turning to the right to issue preclusion on its own terms, there is no basis for finding a waiver of that right in this case. The waiver in *Jeffers*—consistent with other waiver-by-conduct cases—occurred because the defendant took an action that was mutually exclusive with the right he later tried to assert. That is not the situation here.

This Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights." *Zerbst*, 304 U.S. at 464 (internal quotation marks and citations omitted). Against the backdrop of this presumption, this Court has found waiver by conduct only when the defendant's conduct is mutually exclusive with exercising the constitutional right at issue. For example, a defendant who causes "the absence of a witness by wrongdoing" cannot then insist on his Sixth Amendment right to confront that witness. *Davis v. Washington*, 547 U.S. 813, 833 (2006); *accord Reynolds v. United States*, 98 U.S. 145, 158-59 (1879). Similarly, a defendant waives his constitutional right to be present during trial by choosing to be absent, *Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (per curiam), or by "conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

Jeffers illustrates this mutual-exclusivity principle in the double jeopardy context. Specifically, it holds that when a defendant "elects to have the two offenses tried separately and persuades the trial court to honor his election," "his action deprive[s] him of any right that he might have had against consecutive trials." 432 U.S. at 152, 154. Because

demanding two trials is mutually exclusive with invoking the right to a single trial, a defendant who insists upon the former waives the latter.

By contrast, where a defendant's conduct is not mutually exclusive with invoking a double jeopardy safeguard, the conduct does not waive that right. In *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), for example, the defendant was charged with an offense for which he had already been convicted and sentenced. After unsuccessfully objecting on double jeopardy grounds, he pleaded guilty to the second charge. A guilty plea "removes the issue of factual guilt from the case." *Id.* at 62 n.2. The act of pleading guilty, therefore, waives all constitutional rights "logically inconsistent" with disputing one's factual guilt. *Id.* at 63 n.2. But the Court held that a guilty plea "does not waive" the double jeopardy right against multiple prosecutions. *Id.* This is because the right against multiple prosecutions protects against conviction "no matter how validly [the defendant's] factual guilt is established." *Id.* In other words, there is nothing inconsistent about a defendant's admitting that he committed an offense and insisting that the state is constitutionally barred from prosecuting him for it a second time.

Likewise, there is no mutual exclusivity here. Petitioner's consent to two trials is in no way inconsistent with his insistence that his acquittal carry the full legal force that our system affords—including its issue-preclusive effect. This is because issue preclusion does not necessarily prevent a second trial; the prosecution remains free to press forward on any factual theory that the first jury did not reject. *See supra* at 18-19 (citing cases). Since petitioner's conduct was not inconsistent with the

right he seeks to assert, the presumption against waiver holds.

Any other outcome would improperly make the Fifth Amendment right to issue preclusion easier to waive than its civil-law analog. The Restatement (Second) of Judgments lists a handful of "exceptions to the general rule of issue preclusion." *See id.* § 28, at 273-74 (1982). Consenting to multiple trials is not among them. And numerous civil cases expressly hold that mere agreement to bifurcation does not waive the right to issue preclusion. *See, e.g.*, *Butler v. Pollard*, 800 F.2d 223, 224-25 (10th Cir. 1986); *Goldstein v. Cogswell*, No. 85 Civ. 9256 (KMW), 1991 WL 60420, at *15 (S.D.N.Y. Apr. 11, 1991); *see also Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 329-30 (9th Cir. 1995) (waiving claim preclusion does not thereby waive issue preclusion).

"It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) (Holmes, J.). The Virginia Supreme Court's holding contravenes this bedrock principle.

2. At a minimum, consenting to severance should not constitute waiver when done to avoid undue prejudice to the defense.

At the very least, equitable considerations dictate that acquiescing to severance under the circumstances here cannot waive the right to the preclusive effect of an acquittal. Petitioner consented to severance to avoid undue prejudice, and applying issue preclusion would not unfairly disadvantage the prosecution.

a. In numerous double jeopardy cases, this Court has refused to infer waiver from an action the defendant had "no meaningful choice" but to take. *Green*, 355 U.S. at 191. In *Green*, for example, the Government argued that the defendant "'waived' his constitutional defense of former jeopardy to a second prosecution on [a] first degree murder charge by making a successful appeal of his improper conviction of second degree murder." *Id.* (emphasis omitted). This Court rejected the argument, explaining that the law "does not[] place the defendant in such an incredible dilemma." *Id.* at 193. "[I]t cannot be imagined that the law would deny to a prisoner" the ability to take an appeal "unless he should waive" his constitutional protection against double jeopardy. *Id.* at 192.

In *Sanabria v. United States*, 437 U.S. 54 (1978), the Court rejected a similar contention. There, the defendant filed a midtrial motion that the trial judge erroneously granted, causing the defendant to be acquitted. The Government contended that the defendant "waived his double jeopardy right[]" against being retried after an acquittal because he had made the motion that triggered the trial judge's erroneous ruling. *Id.* at 75. Again, this Court would have none of it. Under "the adversary assumption on which our system of criminal justice rests," *id.* at 78, criminal defendants have no reasonable choice but to file motions for various forms of relief, some of which may generate erroneous rulings that lead to acquittals. Defendants, therefore, cannot be forced to choose between filing such motions and waiving their double jeopardy rights. *See id.*

In *Jeffers*, the plurality signaled that this same basic analysis applies when a defendant seeks

severance to avoid "undue prejudice." 432 U.S. at 153. While holding that Jeffers waived his right against multiple trials by requesting severance, the plurality noted that the outcome "might [have] be[en] different" if the defendant had sought separate trials to "ensure that prejudicial evidence . . . would not have been introduced." *Id.* at 153 & n.21.

This case presents that very hypothetical: joining charges that permit the prosecution to introduce evidence of a prior conviction with charges that do not creates a grave risk of undue prejudice. If a jury learns about a defendant's prior conviction, it may "generaliz[e] a defendant's earlier bad act into bad character." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). That is, the jury may "prejudge" the defendant "and deny him a fair opportunity to defend" himself against a charge for which the prior conviction is inadmissible. *Michelson v. United States*, 335 U.S. 469, 476 (1948); *see also Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.) (introducing prior convictions similar to currently charged offenses places "inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time'"). For the very reason that evidence of prior convictions is "highly prejudicial," the Virginia courts have concluded that "justice requires" trial courts to "sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction."

Hackney v. Commonwealth, 504 S.E.2d 385, 388-89 (Va. Ct. App. 1998) (en banc).[3]

In light of these realities, petitioner had no meaningful choice but to agree to severance. He was charged with being a felon in possession, as well as with larceny and breaking and entering. His prior convictions for larceny and breaking and entering were admissible on the former charge but threatened to be acutely prejudicial on the latter charges. Forcing petitioner to choose between a trial free of this undue prejudice and the constitutional right to the issue-preclusive effect of an acquittal would have placed him in an "incredible dilemma," just as this Court forbade in *Green*. 355 U.S. at 193.

b. What is more, refusing to find waiver here would not unfairly burden the prosecution in any way. The Commonwealth propounds the maxim that it is "entitled to [a] 'full and fair opportunity to convict those who have violated its laws.'" BIO 28 (quoting *Johnson*, 467 U.S. at 502); *see also, e.g.*, *Arizona v. Washington*, 434 U.S. 497, 509 (1978). Put another way, the prosecution should be given "one fair opportunity to offer whatever proof it could

---

[3] Other jurisdictions likewise recognize that a serious risk of undue prejudice exists when felon-in-possession charges are joined with other charges. *See, e.g.*, *Brown v. State*, 967 P.2d 1126, 1131 (Nev. 1998) (severance is necessary "to ensure fairness" to the defendant whenever "the State seeks convictions on multiple counts, including a count of possession of a firearm by an ex-felon"); *United States v. Dockery*, 955 F.2d 50, 53 (D.C. Cir. 1992) (district court abused its discretion by refusing to sever felon-in-possession charge because holding a single trial on all charges unduly prejudiced defendant).

assemble." *Burks*, 437 U.S. at 16. But that principle is in no way imperiled here. Issue preclusion, by its very nature, extends only to issues that the prosecution has fully litigated and that were necessarily decided against it. *See Ashe*, 397 U.S. at 443; 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4416, at 424 (3d ed. 2016). Its invocation presupposes that the prosecution has already had a full and fair opportunity to prove an issue. *See Ashe*, 397 U.S. at 446.

This case illustrates the point. After choosing which charges to try first, the Commonwealth had an uninhibited opportunity at the first trial to prove that petitioner played a role in breaking into the Garrisons' home and stealing the safe. *See* J.A. 33-35; *see also* VA Jt. App. 257-67. The jury, however, rejected these allegations. That being so, there is nothing unfair about denying the prosecution a second chance to prove the very same allegations that it already tried and failed to prove. The Double Jeopardy Clause protects against precisely this sort of injustice.

CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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No. 16-1348

In The
Supreme Court of the United States

MICHAEL NELSON CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The Double Jeopardy Clause precludes a subsequent criminal trial when a defendant has been acquitted by a jury in an earlier trial and he proves that the jury necessarily determined an issue of ultimate fact in his favor that would need to be proven beyond a reasonable doubt to convict him at the subsequent trial. The issue presented is:

> Whether a defendant who is charged with multiple crimes and agrees, for his benefit and before any trial has commenced, to have the charges severed and prosecuted in more than one trial may later claim, after being acquitted in the first trial, that issue preclusion bars a subsequent trial on the remaining charges.

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IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL NELSON CURRIER, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT

INTRODUCTION

The Double Jeopardy Clause provides criminal defendants with "three basic protections: '[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)). And like "most basic rights of criminal defendants," double-jeopardy rights can be waived. *Peretz v. United States*, 501 U.S. 923, 936 (1991). This case involves whether a defendant waives his right to argue the issue-preclusive effect of an acquittal—which is one aspect of the protection against successive prosecutions—when he

agrees to have a charge severed for his benefit, and thereby consents to multiple trials.

The Court has recognized that issue preclusion (also known as collateral estoppel) is a fraught doctrine when applied in the criminal context. That is because the government "is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." *Standefer v. United States*, 447 U.S. 10, 22 (1980). Most critically, the government cannot appeal an acquittal no matter how erroneous the decision. *See Evans v. Michigan*, 568 U.S. 313, 318-19 (2013). As a result, the Court has emphasized that "guarded application of preclusion doctrine in criminal cases" is the rule. *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016). In particular, the Court has held that not every acquittal is entitled to issue-preclusive effect in every circumstance. *See id.* at 357; *see also Schiro v. Farley*, 510 U.S. 222, 232 (1994) ("The preclusive effect of the jury's verdict, however, is a question of federal law which we must review *de novo*.").

Despite the doctrine's "guarded application," Petitioner insists that it extends to situations where a criminal defendant has agreed, for his own benefit, to have a charge severed and tried separately, and where he is acquitted at the first trial. The Court should reject the assertion that defendants retain the right to argue the issue-preclusive effect of such an acquittal in connection with the trial on a severed charge. When defendants agree to risk the hazards of a second trial, they do so with full knowledge that they may be acquitted during the first trial and that there is a

significant societal "interest in giving the prosecution one complete opportunity to convict those who have violated [the State's] law." *Arizona v. Washington*, 434 U.S. 497, 509 (1978). A criminal defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges," *Johnson*, 467 U.S. at 502, when the defendant himself voluntarily undertook the risk of the second prosecution, necessarily accepting the possibility of inconsistent results. "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott*, 437 U.S. 82, 99 (1978).

In short, when a defendant willingly subjects himself to a second trial—whether by requesting or consenting to severance, successfully moving for or consenting to a mistrial, or successfully opposing joinder of multiple charges—he forgoes his right to argue that the Double Jeopardy Clause bars the successive prosecution. *See Jeffers v. United States*, 432 U.S. 137, 154 n.22 (1977) (plurality op.) ("The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the [court's] attention.").

Petitioner argues that issue preclusion must be treated differently from the double-jeopardy protection against successive trials because issue preclusion involves an acquittal. At its core, his argument seeks support from the inviolate nature of an acquittal and the claim that his agreement to have separate trials is

not inconsistent with his attempt to now argue issue preclusion. Pet. Br. 9-10, 26-28. But no one disputes the inviolate nature of Petitioner's acquittals for breaking and entering and grand larceny; he can never be tried for those offenses again. And even if there were a reason for treating issue preclusion differently from other rights against successive trials, Petitioner has failed to show why his conduct did not waive his right to argue the issue-preclusive effect of an acquittal in this circumstance.

When Petitioner agreed, for his benefit, to have the firearm charge severed and tried second, he knew that he may be acquitted at his first trial, but he necessarily accepted that the Commonwealth could prosecute him for the firearm charge regardless of whether he was acquitted of breaking and entering and grand larceny. As *Johnson* put it, "the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable" when "the State has made no effort to prosecute charges seriatim." 467 U.S. at 500 n.9. Petitioner should not be relieved of his voluntary choice to risk two trials in exchange for an evidentiary benefit in the absence of any form of government oppression.

It does not change the analysis that, if the charges had been tried together, the jury would have heard evidence that Petitioner was a felon. To be sure, Petitioner faced a difficult choice, whether to consent to severance and face multiple trials or have all three charges resolved in a single trial where the jury would learn he was a felon. But the Constitution does not

prohibit his having to make that choice. A trial is not fundamentally unfair whenever the jury learns that a defendant is a felon. Indeed, there are good reasons why a defendant may well prefer to have a single trial. If a defendant makes that choice, undue prejudice can be avoided by asking the government to stipulate that the defendant is a felon and through the use of limiting instructions. Petitioner therefore is wrong that he was put to an impermissible "Hobson's choice." He may not have liked his options, but having agreed to have separate trials because he decided that was the best course, he should not be allowed to now argue that the second trial is barred simply because he obtained a favorable outcome at the first trial.

Finally, even if Petitioner had not waived his issue-preclusion claim, he would not be entitled to relief. He cannot carry his burden of showing that an issue of ultimate fact was decided in his favor at the trial for breaking and entering and grand larceny that would bar his prosecution at the later trial for being a felon in possession of a firearm.

The Supreme Court of Virginia's judgment should be affirmed.

STATEMENT

1. On March 7, 2012, Paul and Brenda Garrison's home was broken into and a safe was stolen containing approximately $70,000, more than 20 guns, and various personal papers. Pet. App. 3a; *see also* JA 8. Most

of the money was never recovered, but the safe was found at the bottom of a local river with the guns and papers still inside. Pet. App. 3a; *see also* JA 8, 10-11.

Soon after the crime was committed, the police identified Bradley Wood, the Garrisons' nephew, as a suspect. *See* Pet. App. 3a; *see also* JA 11-12. Wood turned himself in and eventually confessed to Detective William Underwood that he stole the Garrisons' safe. *See* Va. App. 159.[1] Wood inculpated two other people in the crimes: his brother Dennis Wood and Petitioner Michael Currier. *See* Pet. App. 3a; *see also* Va. App. 197, 215-16, 237.

After obtaining Bradley Wood's confession, Detective Underwood interviewed Dennis Wood. Va. App. 159. Based on that interview, Detective Underwood found Dennis Wood "to be credible and found no probable cause that he" was involved in stealing the safe. Va. App. 159-60. Indeed, Bradley Wood eventually dropped his accusation against Dennis, but maintained that Petitioner had been an accomplice. Pet. App. 3a-4a; Va. App. 200. Consequently, investigators principally focused on Petitioner.

Detectives included a photo of Petitioner in a photo array that was shown to a neighbor, Cynthia Sandridge, who had been at home when the Garrisons' house was burglarized. Pet. App. 3a. Ms. Sandridge testified at trial that she "had noticed a lot of 'loud banging' and 'loud noises' coming from the Garrison

[1] All references to "Va. App." are to the joint appendix filed in the Supreme Court of Virginia.

residence across the street." *Id.* She subsequently saw "an older model white pickup truck with an orange stripe" drive away from the house. *Id.* She was uncertain whether there were two or three individuals in the truck, and she could not identify the driver. *Id.*; *see also* JA 16-17. But she identified Petitioner "as the passenger" after seeing his photo in the lineup. Pet. App. 3a.

2. Petitioner was indicted by a single grand jury on December 3, 2012 for three charges: breaking and entering, grand larceny, and possession of a firearm by a convicted felon. Pet. App. 3a; *see also* JA 4-6.

"Prior to trial, the defense and the prosecution agreed to sever the firearm charge from the grand larceny and the breaking and entering charges." Pet. App. 4a; Va. App. 598-99 (appellant's brief) ("By agreement between the Commonwealth and Mr. Currier, the circuit court severed Mr. Currier's charges. . . .").[2] Petitioner therefore consented to having two separate trials: one for breaking and entering and grand larceny (the "burglary trial"); and one for possession of a firearm by a convicted felon (the "firearm trial").

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[2] Petitioner has taken different positions on whether he consented to severance. *Compare* JA 47, *with* Va. App. 598-99. But as the Supreme Court of Virginia noted at oral argument, and Petitioner's counsel confirmed, Petitioner agreed to have the firearm charge severed. Oral Arg. 1:08-1:30, *Currier v. Virginia*, No. 160102 (Nov. 2016), https://goo.gl/opMKFk. Petitioner also acknowledged in his petition for a writ of certiorari that he agreed to severance. Pet. 4, 16. And his "Question Presented" is premised on the idea that he "consent[ed] to severance of multiple charges into sequential trials." Pet. Br. i.

Petitioner claims that "[t]he Commonwealth elected to try petitioner first for breaking and entering and grand larceny." Pet. Br. 4; *see also id.* 32 ("After choosing which charges to try first, the Commonwealth had an uninhibited opportunity at the first trial. . . ."). That is incorrect. On September 19, 2013, the Commonwealth and Petitioner filed a joint motion to ensure that the firearm charge would be "heard after the breaking and entering and grand larceny cases." Agreed Mot. to Continue Felon in Possession of Firearm Jury Trial ¶ 2, *Commonwealth v. Currier*, No. 12000-613-00 (Albemarle Cir. Ct. Sept. 19, 2013). Having the firearm charge heard second specifically benefitted Petitioner. If Petitioner were convicted of the firearm charge first, then "the conviction would arguably be before the jury at sentencing" in the event of convictions for breaking and entering and grand larceny. *Id.* ¶ 5. The firearm charge carried a mandatory sentence, so the sentence for that offense would not vary regardless of whether he was convicted of the other charges. *Id.* The court granted the parties' joint motion on September 25, 2013. Order, *Commonwealth v. Currier*, No. 12000-613-00 (Albemarle Cir. Ct. Sept. 25, 2013).

3. Petitioner's burglary trial was held in October 2013. *See generally* Va. App. 32-284 (partial transcripts, jury instructions, and verdict form from the burglary trial).

During the burglary trial, the Commonwealth called Paul Garrison II, Paul Garrison III, Brenda

Garrison, Detective Underwood, Cynthia Sandridge, Dennis Wood, and Bradley Wood as witnesses. The Commonwealth sought to establish that Petitioner helped Bradley Wood steal the safe from the Garrisons' house.[3] Specifically, Bradley Wood testified that he and Petitioner, along with Wood's wife, stole a safe from the Garrisons' house and used a 1978 Ford truck to carry it away. JA 23-27. Wood testified that the safe "was dumped in a river" somewhere "in Nelson County." JA 24. He stated that the guns were "[l]eft . . . in the safe." *Id.* Wood did not provide any additional testimony about what happened to the safe at the river or Petitioner's involvement in disposing of it. On cross-examination, Petitioner's counsel forced Wood to acknowledge the many different lies he had told over the course of the investigation. *See, e.g.*, JA 29 (misrepresented who was driving the truck); *id.* (misrepresented whether he went to the river to dispose of the safe); *id.* at 29-30 (misrepresented who was the lookout); *id.* (lied about how much money was in the safe); *id.* at 30-31 (lied about whether his brother Dennis was involved in the larceny); *id.* at 31 (lied about whether his wife was involved).

In his closing argument, Petitioner's counsel focused the jury on the inconsistent and supposedly unreliable testimony offered by the Commonwealth's witnesses. JA 40 ("So, the defense's position is that the

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[3] The court admonished Wood before he testified that he could not "speak, at all, about [Petitioner's] having any prior record, being arrested, [or] serving any jail time." JA 22.

testimony is not very credible."). In particular, Petitioner focused on Bradley Wood's testimony:

> [Detective Underwood] had great evidence for why Bradley Wood committed this crime and then he said Bradley Wood lied, lied, lied, changed his story over and over again. He said, and I quote, you can't trust, I couldn't trust Bradley Wood and I don't think you-all can trust him either. I think you can trust, I'm willing to trust the fact that he did commit this crime, but that's about it.
>
> JA 39-40.

Petitioner's counsel also questioned Ms. Sandridge's testimony: "she testifies there are either two or three people in the car. . . . [S]he can't tell you how many people are actually in the truck, two or three. What does that mean? It [m]eans we don't know. We really can't tell what happened." JA 40. Petitioner summarized his argument by stating: "The source of information that you have today from Bradley Wood should give you pause. The source of information that you have from Cynthia Sandridge should give you pause in this important decision. Unreliable testimony is how innocent people go to jail." JA 44.

To find Petitioner guilty of breaking and entering, the jury had to find the following elements:

> (1) That the defendant without permission in the daytime broke and entered the dwelling house of Paul Garrison II; and

(2) That he did so with the intent to commit Grand Larceny.

Va. App. 276.

To find Petitioner guilty of grand larceny, the jury had to find the following elements:

(1) That the defendant took currency or property belonging to Paul Garrison II and carried it away; and

(2) That the taking was against the will and without the consent of the owner; and

(3) That the taking was with the intent to steal; and

(4) That the property taken was worth $200.00 or more.

Va. App. 281.

The trial court also instructed the jury that it could convict Petitioner as a "principal in the second degree" if he was "present, aiding and abetting, by helping in some way in the commission of the crime." Va. App. 267. Importantly, though, "[p]resence and consent alone are not sufficient to constitute aiding and abetting." *Id.* "It must be shown that the defendant intended his words, gestures, signals or actions in some way encourage, advise, or urge, or in some way help the person committing the crime to commit it." *Id.*

The jury, in a general verdict, acquitted Petitioner on both counts. Va. App. 284.

After the jury announced its verdict, Petitioner moved to dismiss the pending firearm charge. JA 45. He argued that, in a second trial, the jury could not "find that [Petitioner] possessed firearms when they [were] going to be prevented from knowing that he stole the firearms." *Id.* After hearing from the Commonwealth, the trial court denied his motion. JA 50-51.

4. Petitioner's firearm trial was held in March 2014. Before the trial commenced, Petitioner moved in limine to exclude any "evidence of breaking and entering and theft of the Garrison's house and of the Garrison's safe" on the ground "that it's not relevant to the crime of possessing a firearm." JA 53. The Commonwealth opposed the motion, arguing that "[i]t's impossible for the jury to understand how we get to a safe in the river without the—and how we connect [Petitioner] to the safe in the river without that prior, that prior involvement there in the house." JA 57. Petitioner's motion was denied. JA 60-61.

During the firearm trial, some of the same witnesses testified for the Commonwealth, including Detective Underwood, Cynthia Sandridge, and Bradley Wood. Although their testimony told the general story from the burglary trial, this was the first time additional evidence was introduced about what happened to the safe at the river and that Petitioner was a convicted felon. JA 80-82; Va. App. 480-82. To prove that Petitioner possessed the firearms, the Commonwealth did not need to prove beyond a reasonable doubt that Petitioner was at the Garrisons' house when the safe

was stolen or that he had participated in the burglary or theft. Rather, the case focused on what occurred later, at the river. Bradley Wood testified that Petitioner was at the river with him and while there, Petitioner had taken the guns out of the safe and had laid them on the bed of the truck. Pet. App. 4a; JA 81. Then, after the money had been removed from the safe, Petitioner put the guns back inside the safe and the safe was dumped into the river from the bed of the truck. Pet. App. 4a; JA 82. Consistent with Wood's testimony, the Commonwealth told the court that its theory of the case was that Petitioner "possesse[d]" the firearms "by virtue of his knowledge plus dominion and control in moving the firearms." JA 87.

To find Petitioner guilty of being a felon in possession of a firearm, the jury had to find the following elements:

> (1) That the defendant knowingly and intentionally possessed or transported a firearm; and
>
> (2) That the defendant had been previously convicted of Breaking and Entering.
>
> JA 98.

The jury, in a general verdict, found Petitioner guilty of being a felon in possession of a firearm. JA 99. Petitioner was sentenced to five years' incarceration. Pet. App. 5a.

5. Petitioner appealed his conviction to the Court of Appeals of Virginia, arguing that the issue-preclusion component of the Double Jeopardy Clause barred his trial on the firearm charge.[4] The Court of Appeals rejected his argument and affirmed the trial court's judgment. Pet. App. 2a.

Specifically, the Court of Appeals concluded that the Double Jeopardy Clause does not apply when a charge is severed with the defendant's consent and for his benefit. *See* Pet. App. 5a-6a. The Court of Appeals explained that "the concern that lies at the core of the Double Jeopardy Clause"—"the avoidance of prosecutorial oppression and overreaching through successive trials"—is not present when the defendant consents to severance to avoid the potential prejudice that may result from trying certain charges together. *Id.*; *see also id.* 9a-10a. The Court of Appeals declined to extend *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), to hold that the Double Jeopardy Clause's issue-preclusion protection applies in a case like this one. *See* Pet. App. 7a-10a. Because the Court of Appeals affirmed the trial court's judgment on these grounds, it did not address the Commonwealth's additional arguments for affirmance, including that Petitioner could not show that an issue of ultimate fact was necessarily decided in his favor at the burglary trial. *See* Pet. App. 10a n.1.

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[4] Petitioner also challenged whether the trial court abused its discretion by admitting evidence during the firearm trial related to the theft of the safe that he claimed was unduly prejudicial. *See* Pet. App. 11a-13a; *see also* Va. App. 615-17.

Petitioner appealed to the Supreme Court of Virginia, which granted his petition but ultimately affirmed for the reasons stated by the Court of Appeals. Pet. App. 1a.

SUMMARY OF ARGUMENT

I. Petitioner waived his right to argue that the issue-preclusive effect of the acquittals he received at his burglary trial barred his trial on the firearm charge when he consented prior to the burglary trial to have the firearm charge severed for his benefit and to have that charge tried second. By arguing otherwise, Petitioner seeks to use the Double Jeopardy Clause as a sword to deny the Commonwealth its "one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509. But "the Double Jeopardy Clause . . . [will] not relieve [him] from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99. Indeed, nothing in the Court's precedents sanctions the outcome he seeks.

Petitioner attempts to avoid waiver by elevating issue preclusion above all the rest of the protections afforded criminal defendants under the Double Jeopardy Clause. He downplays what the Court has called the "primary purpose" of the Clause, *Sanabria v. United States*, 437 U.S. 54, 63 (1978), framing it as only "guard[ing] against the mere fact of a successive trial," Pet. Br. 9, in order to claim that the issue-preclusion protection is targeted to a more significant purpose:

"the integrity of a prior acquittal," *id.* Interests in finality, however, do not justify treating issue preclusion differently from other double-jeopardy protections, which can also be waived, and finding waiver here will not undermine the acquittals Petitioner obtained at his burglary trial.

Indeed, the Court has "call[ed] for guarded application of preclusion doctrine in criminal cases." *Bravo-Fernandez*, 137 S. Ct. at 358 (citation omitted). "[P]reclusion doctrine is premised on 'an underlying confidence that the result achieved in the initial litigation was substantially correct.'" *Id.* (citation omitted). "'In the absence of appellate review,' [the Court has] observed, 'such confidence is often unwarranted.'" *Id.* (citation omitted). Because "[t]he Government 'cannot secure appellate review' of an acquittal," issue preclusion must be cautiously applied. *Id.* (citation omitted).

Consequently, the fact that an acquittal is inviolate—or entitled to "special solicitude," Pet. Br. 15—does not answer the question in this case. The Court's decisions in *Standefer*, 447 U.S. 10, and *Bravo-Fernandez*, 137 S. Ct. 352, demonstrate that circumstances matter when addressing issue preclusion, and that not every acquittal is entitled to preclusive effect in every case. Under Petitioner's view, *Standefer* and *Bravo-Fernandez* would appear to have given insufficient weight to society's interest in acquittals.

When issue preclusion is properly understood as one aspect of the double-jeopardy protection against successive prosecutions, this case fits comfortably

within the Court's established jurisprudence governing when a defendant's actions waive his right against successive trials. Petitioner cannot dispute that criminal defendants can waive significant rights, including rights protected by the Double Jeopardy Clause. And the Court repeatedly has held that when a defendant takes or consents to an action unrelated to his guilt or innocence that results in a second trial—such as consenting to a mistrial, or successfully opposing joinder of multiple charges—then he cannot take refuge in the Clause's protections. *See, e.g.*, *Evans*, 568 U.S. at 324, 326; *Scott*, 437 U.S. at 98-99, 101; *Jeffers*, 432 U.S. at 152-54.

Even if issue preclusion were treated differently from the right against successive trials, Petitioner still would have waived his right to argue the issue-preclusive effect of his acquittals under the circumstances of this case. When Petitioner agreed to undertake a separate trial on the firearm charge and to have that charge tried second, he was fully aware that he may be acquitted at the burglary trial. He nonetheless opted for severance because he perceived it to be in his best interests. Permitting him to argue that issue preclusion prevents the Commonwealth from prosecuting him on the severed firearm charge would allow Petitioner to use the Double Jeopardy Clause as a sword in a way that is inconsistent with his agreement to sever. Indeed, Petitioner's argument amounts to "heads I win, tails you lose." If a defendant is acquitted at an initial trial, he can avoid the second trial altogether if he can carry his burden of showing

issue preclusion. And if a defendant is convicted at an initial trial, he has a second chance to convince a jury that he should be acquitted at least of one charge. In a case devoid of prosecutorial overreaching or any other form of government oppression, there is no cause to excuse Petitioner from his voluntary choice to have two trials and thereby take away the government's "one full and fair opportunity" to prosecute him on all his criminal charges. *Johnson*, 467 U.S. at 502.

II. Even if Petitioner had not waived his right to assert the issue-preclusive effect of his acquittals, he would not be entitled to relief. Issue preclusion does not bar the Commonwealth from presenting basic facts to the jury about the offenses he was acquitted of committing. The doctrine only applies to issues of "ultimate fact" decided at an earlier trial that must be proved beyond a reasonable doubt at the later trial. Here, Petitioner bears the burden of demonstrating that there was only one rational reason the jury acquitted him at the burglary trial, and that that factual determination would have to be found differently in order to convict him of illegally possessing a firearm. Because he cannot show that any issue of ultimate fact was decided in his favor, his issue-preclusion claim fails. Moreover, under the Commonwealth's theory of the case in the firearm trial, it did not need to prove beyond a reasonable doubt any of the ultimate facts at issue in the burglary trial. Separate evidence, introduced solely at the firearm trial, proved both that Petitioner was a felon and

that he possessed the firearms after they had been stolen. That is all the Commonwealth had to prove.

ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment provides that: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The principle of double jeopardy has deep historical roots, with both Lord Edward Coke and William Blackstone discussing the protection in their writings. Lord Coke linked the principle with "three related common-law pleas: *autrefois acquit*, *autrefois convict*, and pardon," which "could be raised to bar the second trial of a defendant if he could prove that he had already been convicted of the same crime." *United States v. Wilson*, 420 U.S. 332, 340 (1975) (citing 3 E. Coke, *Institutes* 212-13 (6th ed. 1680)). Similarly, Blackstone wrote that the double-jeopardy principle "was a 'universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.'" *Id.* (quoting 4 W. Blackstone, *Commentaries on the Laws of England* *335-36).

In *Green v. United States*, this Court concluded that the Double Jeopardy Clause incorporated this common-law principle into the U.S. Constitution: "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction

more than once for an alleged offense." 355 U.S. 184, 187 (1957).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88.

"The primary purpose of the Double Jeopardy Clause" therefore is "to protect the integrity of a final judgment." *Scott*, 437 U.S. at 92. But a second, closely related aim of the protection is to guard against "prosecutorial overreaching" or "Government oppression." *Johnson*, 467 U.S. at 501; *see also Scott*, 437 U.S. at 99.

The Double Jeopardy Clause was not originally construed to include an issue-preclusion component. *See Bravo-Fernandez*, 137 S. Ct. at 358; *id.* at 367 (Thomas, J., concurring). The principle was incorporated as part of the Clause's protections in *Ashe* in 1970, when the Court was confronted with the problem of a seemingly successive trial that did not fit existing precedent. In *Ashe*, the petitioner had been acquitted of robbing one of six players at a poker game. 397 U.S. at 437-40. After the acquittal, the State attempted to

prosecute the petitioner for robbing a different player at the same poker game. *Id.* The Court found the second prosecution barred by the Double Jeopardy Clause on an issue-preclusion theory: 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. Applying that doctrine for the first time in the double-jeopardy context, the Court concluded that the second prosecution was impermissible because "[t]he single rationally conceivable issue in dispute before the jury [at the first trial] was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not." *Id.* at 445.

This case asks whether a defendant forgoes his right to argue that a later trial, which is being held solely because the defendant consented to severance of a criminal charge for his benefit, is barred on the basis of issue preclusion when the defendant was acquitted at the earlier trial on the non-severed charges. Because the right to argue issue preclusion should not be treated differently from other protections against successive trials, and because Petitioner voluntarily relinquished the issue-preclusion right by agreeing to have a charge severed for his benefit, the answer should be yes.

I. Petitioner's pre-trial consent to have a criminal charge severed solely for his benefit waives his right to argue that an acquittal obtained during the initial trial on the non-severed charges bars the later trial on the severed charge.

A. Issue preclusion has limited application in the criminal context.

Last Term, the Court reiterated that issue preclusion must have "guarded application . . . in criminal cases." *Bravo-Fernandez*, 137 S. Ct. at 358 (citing *Standefer*, 447 U.S. at 22-23 & n.18). The reasons why were discussed at length in *Standefer*.

There, the Court declined to apply issue preclusion to find that a defendant's prosecution for aiding and abetting was barred "after the named principal ha[d] been acquitted of" the underlying offense in a separate trial. 447 U.S. at 14, 20. The defendant argued that because "an element of his offense" was conclusively decided in his favor during the principal's trial, preclusion principles applied to bar his trial. *Id.* at 22.

The Court rejected the defendant's argument, concluding that the "policy considerations" motivating the issue-preclusion doctrine have less force in the criminal context because "the [g]overnment is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." *Id.* at 22, 25. Unlike in a civil case, the government is limited in how it can litigate criminal cases in at least four important ways: (1) "the prosecution's discovery rights in criminal cases

are limited"; (2) the government "is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt"; (3) the government "cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence"; and (4) the government "cannot secure appellate review where a defendant has been acquitted." *Id.* at 22. The fourth principle, that the government cannot appeal an acquittal no matter how erroneous its foundation, "strongly militates against giving an acquittal preclusive effect." *Id.* at 23.

Preclusion doctrine "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." *Id.* at 23 n.18. But juries in criminal cases sometimes "acquit out of compassion or compromise or because of their assumption of a power which they ha[ve] no right to exercise, but to which they [a]re disposed through lenity." *Id.* at 22 (internal quotation marks omitted). "[I]n civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors." *Id.* at 23. As a result, in the criminal context, the "underlying confidence" in jury verdicts that the preclusion doctrine depends upon "is often unwarranted." *Id.* at 23 n.18.

Standefer also recognized that criminal cases "involve[ ] an ingredient not present" in the civil context: "the important [public] interest in the enforcement of the criminal law." *Id.* at 24; *see also Arizona v.*

Washington, 434 U.S. at 505 (a defendant's "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury"). "The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases." *Standefer*, 447 U.S. at 25 (citation omitted); *see also id.* ("[T]his criminal case involves 'competing policy considerations' that outweigh the economy concerns that undergird the estoppel doctrine."). Given the competing policy considerations involved in criminal law, issue preclusion necessarily is more limited in its application here than in the civil context. *See Bravo-Fernandez*, 137 S. Ct. at 358.

Despite these important considerations, Petitioner contends that the "special solicitude" accorded to a criminal acquittal means a defendant cannot waive his right to argue the issue-preclusive effect of a future acquittal in cases where he agrees to separate trials on related charges. Pet. Br. 14-15. No one disputes that Petitioner's acquittals on the breaking-and-entering and grand-larceny charges are final and unreviewable. *See Evans*, 568 U.S. at 318. Petitioner cannot be retried for those crimes no matter how erroneous the acquittals may have been. *Id.* But the inviolate nature of those acquittals does not resolve whether Petitioner waived his right to argue that the acquittals bar an agreed-to separate trial on a different but related charge.

Standefer and *Bravo-Fernandez*, for example, demonstrate that some acquittals are not entitled to preclusive effect based on the circumstances surrounding the acquittal. *Bravo-Fernandez*, 137 S. Ct. at 357 (acquittals do not have preclusive effect when inconsistent convictions are vacated on appeal; defendant may be retried for the vacated convictions); *Standefer*, 447 U.S. at 11, 25-26 (acquittal of a principal in one trial does not have any preclusive effect in the separate trial of an accessory on trial for aiding and abetting the principal). Indeed, if Petitioner's position were correct—that "[a] jury's verdict of acquittal . . . [is] a judgment that is owed *unconditional respect*, lest the citizenry lose faith in the fairness of the system," Pet. Br. 15 (emphasis added)—then it is difficult to see how *Standefer* was correctly decided. Under Petitioner's view, relitigating whether the underlying offense occurred at the accessory's trial would seemingly undercut the "'community's collective judgment' that the prosecution ha[d] failed to prove its allegations" about the principal's conduct at the first trial. Pet. Br. 15 (quoting *Yeager*, 557 U.S. at 122). But *Standefer* was correctly decided. The outcome represents an appropriate balancing between "the public interest in the enforcement of the criminal law" and the competing interest in "safeguarding the rights of the individual defendant." *Standefer*, 447 U.S. at 25.

Petitioner further contends that issue preclusion should not be "easier to waive" in a criminal case than it is in a civil case. Pet. Br. 28. That contention does not necessarily follow given the acknowledged limitations

on issue preclusion in the criminal context. But in any event, not all judgments are entitled to preclusive effect in civil cases. Indeed, an otherwise valid judgment may be denied preclusive effect in a civil case for a multitude of reasons. *See, e.g.*, 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4426 (3d ed. Sept. 2017 update) (listing numerous reasons why "principles of justice or the public interest" may limit application of issue preclusion in a civil case); Restatement (Second) of Judgments § 28 (1982). As the Restatement (Second) of Judgments explains, "the policy supporting issue preclusion [in a civil case] is not so unyielding that it must invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts." Restatement (Second) of Judgments § 28, cmt. g; *see also id.* cmt. j ("[D]iscretion to deny preclusive effect to a determination [in light of plain unfairness] is central to the fair administration of preclusion doctrine."). Thus, there is no merit to Petitioner's claim that finding waiver here would treat criminal defendants worse than civil litigants.

B. Criminal defendants can waive their double-jeopardy right against successive prosecutions by taking certain actions before and during trial, and they should be able to waive the right to issue preclusion in the same manner.

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine in it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). "The most basic rights of criminal defendants are . . . subject to waiver." *Peretz*, 501 U.S. at 936. For example, a criminal defendant can forfeit his right to attend every stage of a criminal trial and to have a public trial. *United States v. Gagnon*, 470 U.S. 522, 528-29 (1985); *Levine v. United States*, 362 U.S. 610, 619 (1960). And defendants also can waive their rights under the Fourth and Fifth Amendments. *See, e.g.*, *Segurola v. United States*, 275 U.S. 106, 111-12 (1927); *see also Peretz*, 501 U.S. at 936 (citing *United States v. Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) ("failure to object results in forfeiture of claim of unlawful postarrest delay"); *United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (failure to object waives "double jeopardy defense"); *United States v. Coleman*, 707 F.2d 374, 376 (9th Cir. 1983) (failure to object constitutes waiver of Fifth Amendment claim)). Rights protected by the Double Jeopardy Clause are treated no differently.

1. Issue preclusion is one aspect of the right against successive trials, which is waived when the defendant takes an action, unrelated to culpability and prior to an acquittal, that results in the need for a second prosecution.

Issue preclusion's elevation to constitutional status is best viewed as a result of this Court's effort to protect criminal defendants' double-jeopardy rights against successive prosecutions when it had become "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. "As the number of statutory offenses multiplied" over time, "the potential for unfair and abusive reprosecutions became far more pronounced," creating "the need to prevent such abuses through the doctrine of collateral estoppel." *Id.* Consistent with *Ashe*'s and *Johnson*'s treatment of issue preclusion as part of the right against successive trials and the Court's precedent on when a defendant waives his right against successive trials, it is plain that Petitioner waived his right to argue the issue-preclusive effect of an acquittal in a case like this one where he agreed to sever a charge for his benefit. *Johnson*, 467 U.S. at 500 n.9 ("[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."); *Ashe*, 397 U.S. at 447 (finding that "the constitutional guarantee forbids" prosecutors from using the

"first trial as no more than a dry run" for the second prosecution).

The Court long ago established that what matters when deciding if a defendant has given up his right to assert double jeopardy in a second trial is whether the defendant acted in a way or consented to an action that led to the "termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused." *Scott*, 437 U.S. at 98-99. In such a case, the defendant "suffers no injury cognizable under the Double Jeopardy Clause" when he is tried again. *Id.* By agreeing to a separate trial on the firearm charge, Petitioner consented to the "termination" of that portion of the prosecution, and he therefore has waived his right to argue double jeopardy with respect to the severed charge. *Id.*

Agreeing pre-trial to severance—i.e., agreeing to have one or more charges tried separately from other related charges—is analogous to one of the most litigated issues in the double-jeopardy context: whether the government can retry a defendant for the same offense when the original trial terminates for various reasons. *See, e.g.*, *United States v. Jorn*, 400 U.S. 470, 480-84 (1971) (Harlan, J.) (plurality op.) (providing examples of cases involving reprosecution). In deciding whether a second trial is permitted in a particular case, the Court has asked two general questions: (1) did the defendant seek or consent to the termination of the first trial for a reason unrelated to guilt or innocence; and (2) did the defendant's action result in an acquittal. Two cases, *United States v. Scott* and

Evans v. Michigan, illustrate how a criminal defendant can waive his right against successive trials.

In *Scott*, the defendant moved multiple times, both before and during trial, to dismiss two counts of a three-count indictment "on the ground that his defense had been prejudiced by preindictment delay." 437 U.S. at 84. The district court granted his motion to dismiss "[a]t the close of all the evidence," and "submitted the third count to the jury, which returned a verdict of not guilty." *Id.* The government appealed the dismissal order, and this Court concluded that a second trial on the dismissed charges was not barred by the Double Jeopardy Clause. *Id.* In reaching that decision, the Court noted that the situation in *Scott* "scarcely [paints] a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact." *Id.* at 96.

> It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.
>
> *Id.*

Thus, the second trial was constitutionally permissible because the defendant had invited the court's action that caused the second trial, and the court's

dismissal order did not implicate the defendant's guilt or innocence. *See id.* at 98-99, 101; *see also United States v. Dinitz*, 424 U.S. 600, 609 (1976) (framing the issue as whether the defendant had "request[ed] or consent[ed] to a mistrial").

By contrast, *Evans v. Michigan* held that a defendant cannot be retried when a trial court erroneously grants a defendant's mid-trial motion for acquittal. 568 U.S. at 315-16. It made no difference that the defendant had invited the trial court's error, because the court's decision constituted a determination of the defendant's guilt or innocence. *Id.* at 326. "These sorts of substantive rulings stand apart from procedural rulings that may also terminate a case midtrial, which [the Court] generally refer[s] to as dismissals or mistrials." *Id.* at 319. Thus, the distinguishing factor between the outcomes in *Scott* and *Evans* was whether the defendant's actions had resulted in a determination of his "[c]ulpability (i.e., the 'ultimate question of guilt or innocence')." *Id.* at 324. "[W]hen a defendant persuades the court to declare a mistrial, jeopardy continues and retrial is generally allowed. But in such circumstances the defendant consents to a disposition that contemplates reprosecution, whereas when a defendant moves for acquittal he does not." *Id.* at 326 (citing *Sanabria*, 437 U.S. at 75; *Dinitz*, 424 U.S. 600).

Scott and *Evans* therefore provide a straightforward rule: a defendant waives his right to argue that his second trial is barred on double-jeopardy grounds when he is responsible for the relevant charge not being submitted to the first trier of fact for reasons

unrelated to guilt or innocence. Here, Petitioner agreed to a separate trial on the firearm charge without reservation at a time when he knew there was a chance he would be acquitted at the initial burglary trial. That is the quintessential example of waiver in the double-jeopardy context.

Lest there be any doubt, *Jeffers v. United States* shows how, consistent with *Scott* and *Evans*, a defendant like Petitioner waives his double-jeopardy rights when his pre-trial actions result in multiple trials. In *Jeffers*, a defendant opposed the government's attempt to try multiple charges against him in one proceeding. 432 U.S. at 139. The defendant's opposition was successful, and the trial court scheduled two separate trials for the related offenses. *Id.* at 143-44. "When it appeared that [the second] trial was imminent, petitioner filed a motion to dismiss the indictment on the ground that in the [first] trial he already had been placed in jeopardy once for the same offense." *Id.* at 144. Like Petitioner, the defendant tried to avoid the waiver problem by asserting that he had been forced to choose between "his Sixth Amendment right to a fair trial" and "his Fifth Amendment double jeopardy right." *Id.* Thus, according to the defendant, "[a] finding of waiver . . . would amount to penalizing the exercise of one constitutional right by denying another." *Id.*

The *Jeffers* plurality rejected that argument. "[A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two

offenses tried separately and persuades the trial court to honor his election." *Id.* at 152. Indeed, "[t]his situation is no different from others in which a defendant enjoys protection under the Double Jeopardy Clause, but for one reason or another retrial is not barred." *Id.* "Both the trial after the appeal and the trial after the mistrial are, in a sense, a second prosecution for the same offense, but, in both situations, the policy behind the Double Jeopardy Clause does not require prohibition of the second trial." *Id.*

Because issue preclusion is simply one aspect of the double-jeopardy protection against successive prosecutions, the same analysis applies here. *Id.* at 154 n.22 ("The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the [court's] attention."). The rule drawn from *Jeffers*, *Scott*, and *Evans* fully applies even in light of the "constitutional policy of finality for the defendant's benefit in . . . criminal proceedings." *Jorn*, 400 U.S. at 479. Finality concerns are not implicated when the defendant consents to the second proceeding, irrespective of whether the second trial is for the same offense or for a different charge that was severed from the first proceeding prior to trial. *See id.* at 484-85. A defendant's acquittal, if he obtained one as in *Scott*, is still final and no one disputes that he cannot be prosecuted again for that offense. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). But by the same token, "the acquittal gains no preclusive effect," *Bravo-Fernandez*, 137 S. Ct. at 357; *see supra* Part I.A, in light of the

defendant's voluntary decision to hazard the risks of a second trial, and so it cannot be used to argue issue preclusion at the second trial.

2. Even if issue preclusion is to be analyzed separately from the right against successive trials, Petitioner's consent to severance waived his right to argue the issue-preclusive effect of the acquittals at the second trial.

Petitioner attempts to discount the successive-prosecution cases where the Court has found waiver simply because those cases did not expressly involve issue preclusion. To support that argument, he advances a theory that he claims explains the result in those cases but would not support finding waiver here: his agreement to severance does not constitute waiver because it is not "inconsistent with" or "mutually exclusive with" arguing the issue-preclusive effect of his acquittal. Pet. Br. 26-28. Even assuming issue preclusion is treated differently from other protections against successive trials, Petitioner's conduct was inconsistent with the right he is attempting to assert. By agreeing to have multiple trials in exchange for an evidentiary benefit, Petitioner knowingly took the risk that he could be acquitted at one of the trials and convicted at the other. That is all that is required to find waiver here.

Petitioner's "mutual exclusivity" or "inconsistency" argument is principally based on *Menna v. New York*,

423 U.S. 61 (1975) (per curiam).[5] But Petitioner is wrong that *Menna* supports his position. *Menna* states that "[a] guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." 423 U.S. at 62 n.2. In other words, a defendant waives his double-jeopardy right when asserting it would be inconsistent with the act constituting waiver. The Court found no waiver in *Menna* because the defendant's admission of factual guilt had no relation with his assertion of his double-jeopardy right.

Petitioner asserts that this case is like *Menna* because there is no inconsistency in agreeing "to two trials" but "insist[ing] that his acquittal carry the full legal force that our system affords." Pet. Br. 27. But he is wrong; the decision to agree to severance is inextricably linked with the right to argue issue preclusion during the second trial. At the time of severance, defendants are fully aware of the possibility that the first trial will result in an acquittal. For the benefits they associate with severance, however, *see* Pet. Br. 28-31, they should be deemed as having accepted the potential for inconsistent verdicts if they are acquitted at the

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[5] *Menna* was cabined to its procedural posture by *United States v. Broce*, 488 U.S. 563, 575-76 (1989) (limiting challenges to guilty pleas on double-jeopardy grounds like that raised in *Menna* to errors apparent on the existing record). *Menna* therefore does not stand for the general proposition that Petitioner claims it does, "that a guilty plea 'does not waive' the double jeopardy right against multiple prosecutions." Pet. Br. 27 (citation omitted).

first trial and the acquittal would have ordinarily barred the second trial where they could be convicted. *See Standefer*, 447 U.S. at 25 ("While symmetry of results may be intellectually satisfying, it is not required." (citing *Hamling v. United States*, 418 U.S. 87, 101 (1974))).

It makes little difference to the analysis that Petitioner did not state on the record that he was waiving his right to argue issue preclusion. There is no requirement for a trial court to engage in the equivalent of a plea colloquy to determine what specifically a defendant is waiving by agreeing to severance. "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived [his constitutional] rights. . . . [I]n at least some cases waiver can be clearly inferred from the actions and words of the [defendant]." *See North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

The Court applied that framework in *United States v. Gagnon*, where the defendants were found to have waived their right to attend all stages of the proceedings. 470 U.S. at 527-28. Although "there was no proof that [defendants] expressly or impliedly indicated their willingness to be absent from" part of the proceeding, the defendants nonetheless had waived their right to be present by not specifically raising the issue. *Id.* Courts "need not get an express 'on the record' waiver from the defendant" in order to find that he has impliedly waived the relevant right. *Id.* at 528; *see also Butler*, 441 U.S. at 374-76 (holding that defendants can "implicit[ly] waive" their *Miranda* rights

through their conduct, and rejecting a requirement that there be "an *express* waiver"). All that matters is whether a defendant's actions evidence his intent to relinquish his rights, regardless of whether he expressly states that he is surrendering a specific right. *See Butler*, 441 U.S. at 373 n.4 ("a court *may* find an intelligent and understanding rejection of [the constitutional right] in situations where the defendant did not *expressly* state as much"); *see also Patton v. United States*, 281 U.S. 276, 295, 298 (1930) (noting that waiver of a number of constitutional rights can be found based on a wide range of actions by the defendant).

The reason why issue preclusion was incorporated as part of the Double Jeopardy Clause's protections fully supports finding that Petitioner waived his right to argue issue preclusion when he consented to multiple trials in exchange for an evidentiary benefit. In *Johnson*, this Court refused to extend issue-preclusion protection to a defendant who had pleaded guilty to lesser-included offenses and then had asserted, over the government's objection, that the Double Jeopardy Clause barred his prosecution on the remaining charges. 467 U.S. at 494. In reaching that conclusion, the Court unequivocally stated that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Id.* at 500 n.9. Where a defendant consents to sever a charge for his benefit and agrees with how the

trials are sequenced, it is indisputable that no prosecutorial overreaching has occurred.

Petitioner responds to *Johnson* by dismissing its discussion of issue preclusion as "dicta." Pet. Br. 22-23. His claim that "*Johnson* did not involve issue preclusion," *id.* 22, however, is directly refuted by the Court's opinion: it explained that "*Respondent also argues* that prosecution on the remaining charges is barred by the *principles of collateral estoppel* enunciated by this Court in *Ashe*." *Johnson*, 467 U.S. at 500 n.9 (emphasis added). Thus, *Johnson* plainly did present a question related to issue preclusion, which the Court addressed by rejecting respondent's argument and holding that issue preclusion did not apply.

Because Petitioner agreed to sever the firearm charge based on the benefit he stood to receive from severance, there was no prosecutorial overreaching in this case. Petitioner, however, takes the position that issue preclusion applies irrespective of which party was responsible for the successive prosecution. Pet. Br. 18-20. He contends that the Court reached that conclusion in *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam), and *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam).

But *Harris* and *Turner* did not involve the question of waiver. *Turner*, 407 U.S. at 368-69 (finding, without mentioning waiver, the issue-preclusion protection implicated where "petitioner was not charged with robbery at the first trial" and "the State has stipulated that the robbery and murder arose of 'the same

set of facts, circumstances, and the same occasion'"); *Harris*, 404 U.S. at 55-57 (concluding, without mentioning waiver, that issue preclusion applied where the defendant was acquitted of murder for one person killed by a bomb, and the prosecution attempted to try him again for the murder of someone else killed by the same bomb). And so, regardless of whether a lack of prosecutorial overreaching can defeat issue preclusion in an ordinary case, *Harris* and *Turner* say nothing about whether a defendant waives his right to argue issue preclusion when he chooses to have separate trials for related charges in order to obtain a benefit.

3. Defendants like Petitioner have a meaningful choice in deciding whether to sever charges or to have all charges tried together.

Petitioner's decision to agree to sever the firearm charge and have separate trials—rather than to insist on a single trial on all charges—is a plain example of waiver. Pet. App. 4a; Va. App. 598-99. He willingly accepted the risks and burdens of multiple trials in order to obtain a clear benefit during his first trial—preventing the jury from learning that he had already been convicted once of breaking and entering. That voluntary choice precludes Petitioner from now attempting to deny the Commonwealth "its right to one full and fair opportunity to convict those who have violated its laws." *Johnson*, 467 U.S. at 502; *see also Scott*, 437 U.S. at 93-94 ("Such [an action] by the defendant is deemed to be a deliberate election on his part to forgo his

valued [double-jeopardy] right. . . . 'The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed. . . .'" (quoting *Dinitz*, 424 U.S. at 609); *see also United States v. Tateo*, 377 U.S. 463, 467 (1964) (Harlan, J.) ("If [the defendant] had *requested* a mistrial . . . there would be no doubt that if he had been successful, the Government *would not have been barred* from retrying him.") (second emphasis added).

Petitioner attempts to cast his decision as a Hobson's choice, contending that being forced to choose between severance and a single trial presented him with "no meaningful choice," and that he had no real option but "to agree to severance." Pet. Br. 31. That argument fails. Just as in *Jeffers*, Petitioner's "alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy right is illusory." *Jeffers*, 432 U.S. at 153 n.21.

> The "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."
>
> *McKune v. Lile*, 536 U.S. 24, 53 (2002) (plurality op.) (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

Petitioner was not forced to choose between competing constitutional rights in this case. *See, e.g., Simmons v.*

United States, 390 U.S. 377, 394 (1968) (holding that it is "intolerable that one constitutional right should have to be surrendered in order to assert another"). The Court has consistently rejected the argument that the Constitution precludes evidence of a defendant's prior convictions simply because such evidence is prejudicial. *See, e.g., Spencer v. Texas*, 385 U.S. 554, 562-69 (1967). Petitioner was simply confronted with one of the "difficult choices" that attends tactical litigation decisions in the criminal justice system, *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)—whether to risk multiple trials or have indisputably probative but potentially prejudicial evidence admitted during the course of a single trial.

Indeed, Petitioner's argument overlooks good reasons why a defendant might *want* a single trial in cases like his. For example, a defendant might opt for a single trial if he intends to testify in his own defense. By testifying, the defendant almost certainly will be impeached with the fact that he is a felon. Fed. R. Evid. 609(a); Va. S. Ct. R. 2:607(a), 2:609(a); *see also Ohler v. United States*, 529 U.S. 753, 758 (2000) ("If the defendant testifies, [the government] must choose whether or not to impeach her by use of her prior conviction."). In that circumstance, there is little benefit to be gained from severing the felon-in-possession charge—the first jury will learn that the defendant is a felon either way.

Moreover, because Virginia has jury sentencing, a defendant may also prefer to have a single trial to ensure a single sentencing event. In Virginia, a felon-in-possession conviction frequently carries a mandatory

minimum sentence of two or five years, depending on the circumstances. Va. Code Ann. § 18.2-308.2(A) (2017). At a single sentencing event, a defendant can ask the jury to show leniency in imposing discretionary sentences in light of the mandatory sentence that the jury must impose for the firearm conviction. If the defendant is tried and sentenced separately, however, the defendant loses the ability to ask the jury to balance leniency for the discretionary sentence with the mandatory one. And the second jury will still be required to impose the mandatory minimum for the firearm offense.

If a defendant elects a single trial, he can attempt to mitigate any potential prejudice by asking the government to stipulate that he is a felon within the meaning of the statutory offense. Such a stipulation avoids having the defendant's status discussed at any length during the trial. While the government may not be constitutionally required to enter into a stipulation, it may be reversible error not to stipulate in circumstances like those presented here where Petitioner's prior felony also involved breaking and entering. *See Old Chief v. United States*, 519 U.S. 172 (1997). *Old Chief* expressly states that "what counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Id.* at 184. "[A] party's concession is pertinent to the court's discretion to exclude evidence on the point conceded." *Id.*[6]

[6] The Supreme Court of Virginia has not yet addressed whether *Old Chief* would require the Commonwealth to accept a

Moreover, the defendant could ask the court to give a limiting instruction. *See, e.g., Spencer*, 385 U.S. at 562-63. Thus, there are circumstances where a defendant would prefer a single trial, and there are ways that he (or a court) could mitigate the risk of undue prejudice.

Petitioner had a meaningful choice to make in this case, and he chose the procedural path that made the most sense to him at the time. Had he instead opted for a single trial, Petitioner "could have preserved his point [about undue prejudice] by proper objection," and he could have sought appellate review of that issue. *Jeffers*, 432 U.S. at 154. "Instead, he was solely responsible for the successive prosecutions. . . ." *Id.* And "[u]nder the circumstances, . . . his action deprive[s] him of *any right* that he might have had against consecutive trials." *Id.* (emphasis added). Issue preclusion "does not relieve a defendant from the consequences of his voluntary choice" to have a charge severed for his benefit. *Scott*, 437 U.S. at 99.

II. The judgment of the Supreme Court of Virginia should be affirmed because Petitioner cannot establish that the jury necessarily determined an issue of ultimate fact in his favor.

Ultimately, there is no need in this case for the Court to decide whether criminal defendants waive their right to argue issue preclusion by consenting to

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defendant's offer to stipulate. *See Boone v. Commonwealth*, 740 S.E.2d 11, 14 & n.* (Va. 2013).

severance of a charge for their benefit. Petitioner cannot carry his burden of showing that an issue of ultimate fact was determined in his favor at the burglary trial that would bar the firearm trial. Unlike *Yeager*, where the Court remanded in light of the "voluminous" record and "complex[]" proceedings, 557 U.S. at 125-26, the record in this case makes abundantly clear that Petitioner cannot carry his burden. For reasons of constitutional avoidance, the Court therefore should decline to address the novel constitutional question about waiver presented in this case. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity in deciding them.").

But even if the Court does answer the waiver question and concludes that Petitioner has not waived his right to argue issue preclusion, there is no need for a remand given Petitioner's obvious inability to prove issue preclusion based on the uncomplicated record in this case. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the [lower courts].").

A. Issue preclusion does not prevent the government from introducing evidence of basic facts litigated in a previous trial.

Throughout his brief, Petitioner insists that the issue-preclusion protection "precludes 'relitigating any *issue* that was necessarily decided by a jury's acquittal in a prior trial.'" Pet. Br. 5, 9, 13 (quoting *Yeager*, 557 U.S. at 119). To the extent that Petitioner is arguing that issue preclusion applies to prohibit the government from introducing relevant background evidence, *see id.* 14, he is mistaken.

Issue preclusion in the criminal context serves only to bar the government from litigating "an issue of ultimate fact" that was "determined by a valid and final judgment . . . between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. A defendant bears the burden "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350 (1990). Unless Petitioner's assertion is that the jury at the burglary trial must have decided *every fact* in his favor—and that every one of those facts is an "ultimate fact" that the Commonwealth had to prove beyond a reasonable doubt to convict him for illegally possessing a firearm—then issue preclusion does not apply to the basic facts that he appears to be complaining about.

Indeed, *Dowling* rebuts that argument. The issue presented in *Dowling* was whether the Double Jeopardy Clause or the Due Process Clause prohibited the

government from using testimony "relating to an alleged crime that the defendant had previously been acquitted of committing." 493 U.S. at 343-44. Specifically, a witness in a defendant's trial on federal robbery charges testified that the defendant had broken into her house in the Virgin Islands and attempted to rob her. *Id.* at 344-45. Because the defendant had already been acquitted of those crimes, *id.*, he argued that "his prior acquittal precluded the Government from introducing into evidence [the witness's] testimony," *id.* at 348. The Court rejected that argument, explaining that "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." *Id.* And the Court "decline[d] to extend *Ashe* . . . to exclude in all circumstances, as [the defendant] would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.*

Just as in *Dowling*, the Commonwealth was entitled to introduce evidence in this case that complied with Virginia's evidentiary rules. Indeed, Petitioner filed a motion in limine before the second trial seeking to prevent the Commonwealth from introducing evidence related to the charges for which he had been acquitted, but his motion was denied. JA 52-61. Petitioner has abandoned any challenge to the Virginia courts' decisions upholding that evidentiary ruling. *See* Pet. App. 1a-2a.

B. Petitioner cannot carry his burden of showing that the jury at the burglary trial necessarily decided that he never possessed the firearms.

Petitioner's conviction should stand even if he did not waive his right to argue issue preclusion. *Ashe* instructs that "realism and rationality" are the guides for determining what was necessarily decided in a prior criminal proceeding, and

> [w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe, 397 U.S. at 444 (citation omitted).

If "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose," then the issue-preclusion component of the Double Jeopardy Clause does not apply. *Id.*; *see also Yeager*, 557 U.S. at 127 (Kennedy, J., concurring) ("[T]he judgments of acquittal preclude the Government from retrying petitioner on the issue of his possession of insider information if, and only if, 'it would have been *irrational* for the jury to acquit without finding that fact.'"). Petitioner cannot carry that burden on this record.

The simplest basis for rejecting Petitioner's claim is because the elements for being a felon in possession of a firearm do not require the Commonwealth to prove beyond a reasonable doubt that he broke into the Garrison home and stole the safe. *Compare* Va. App. 276, 281, *with* Va. App. 530-31. To find Petitioner guilty of the firearm charge, the jury only needed to find two elements: (1) that he had previously been convicted of a felony; and (2) that he had intentionally possessed a gun. JA 98. None of the evidence the Commonwealth offered to prove those two elements involved the breaking-and-entering or grand-larceny offenses.

The Commonwealth's theory of the firearm case, which prevailed at trial, was that Petitioner had possessed the guns when he helped Bradley Wood dispose of the stolen safe; Petitioner took the guns out of the safe, and then he put them back in before the safe was dumped in the river. JA 87. Evidence in support of that theory was not presented at the burglary trial, which concerned only the grand-larceny and breaking-and-entering charges—nor was such evidence relevant to what had occurred at the Garrisons' house. At the second trial—and only at the second trial—Wood testified that Petitioner had handled every gun in the safe when it was opened at the river. JA 81-82. That evidence alone was sufficient to convict Petitioner on the firearm charge. Although the basic facts about Petitioner's involvement in stealing the safe were relevant to tell the story about how Petitioner had ended up at the river, the jury did not need to find beyond a reasonable doubt that Petitioner actually broke into the

Garrisons' house and helped steal the safe in order to convict him for being a felon in possession of a firearm. Petitioner violated the law when he possessed the guns at the river; how he got there or whether he helped steal the guns is not an element of the firearm offense.

Even if the firearm charge did depend on proof beyond a reasonable doubt that Petitioner was at the Garrison home, Petitioner's claim would still fail. Although Petitioner claims now that the burglary trial focused on a single fact—whether he was present at the scene of the crime, Pet. Br. 4—he never conceded that that was the sole fact at issue during the trial. *See* JA 40-44. Petitioner's counsel's closing argument plainly challenged the testimony of the Commonwealth's witnesses as so inconsistent and unbelievable that there was no way to know what happened the day the Garrisons' home was broken into and the safe stolen. *See generally* Va. App. 240-53.

For example, the closing argument highlighted the testimony of the Garrisons' neighbor, Ms. Sandridge, and her inability to "tell [the jury] how many people are actually in the truck, two or three." JA 40. After recounting her testimony, Petitioner's counsel argued that, "[w]e really can't tell what happened, you know, how many people were in the truck. She doesn't know if the driver was a man or a woman and she can remember nothing about the driver. . . ." *Id.*

With respect to Bradley Wood's testimony, Petitioner's counsel did not concede that Wood must have had an accomplice and argue that it just was not him;

instead, Petitioner's counsel argued that Wood was an obvious liar and that it was impossible to know what had happened that day. In a series of rhetorical questions posed to the jury, Petitioner's counsel asked: "what do we believe about [Wood] based on everything else? What do we not believe? What's the story? But I submit [that] you can't figure out what it is. You can't try and figure it out. We have absolutely no idea. He cannot tell the truth. . . . He had no shame about his lies." JA 41-42. And the final question Petitioner's counsel put to the jury was "when you go back into the jury room ask yourself the question, do you have total confidence in the Commonwealth's case that you can put a man who is presumed innocent in jail?" JA 45.

Petitioner's decision to argue his case to the jury based on the inconsistency of the Commonwealth's evidence in general—as opposed to arguing specifically that he was not in the truck—makes it impossible to determine the basis for the jury's verdict. *Dowling*, 493 U.S. at 352 (declining to find issue preclusion where "[t]here are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial"); *Schiro*, 510 U.S. at 232-33 (similar). Unlike the situation in *Ashe*, it would not have been irrational for the jury to acquit Petitioner because the Commonwealth had not proven beyond a reasonable doubt that Petitioner had entered the house or rendered any aid even if the jury believed that Petitioner was in the truck and at the scene. That is one rational outcome given the arguably inconsistent testimony about how many people were in the truck and Wood's uncorroborated

accomplice testimony about events that occurred inside the house.

The jury instructions given to the jury before it deliberated would have supported such a conclusion. *See* Va. App. 262 ("You may not arbitrarily disregard believable testimony of a witness, however, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper."), 267 ("Presence and consent alone are not sufficient to constitute aiding and abetting."). The jury could have believed Ms. Sandridge that Petitioner was present in the truck, but disbelieved Wood's testimony that Petitioner helped with the crimes inside the Garrison home.[7] Because of how Petitioner argued the case, it is impossible to know whether that is the conclusion the jury reached or whether they thought Petitioner was not present at all.

Consequently, Petitioner cannot carry his burden of showing that the issue-preclusion protection would apply in this case.

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[7] For example, because Wood was a relative of the Garrisons, the jury could have concluded that Petitioner unwittingly helped Wood steal the safe, believing Wood had permission to take his uncle's property.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

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No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Neither the Commonwealth nor the Solicitor General defends the primary rationale offered by the Virginia Court of Appeals—namely, that the Double Jeopardy Clause was not violated here because there was no "prosecutorial overreaching." Nor is there any dispute that when state law requires severance to avoid unduly prejudicing the defense, the accused is entitled to invoke the issue preclusion doctrine with respect to the second trial. *See* Petr. Br. 18-19 (discussing *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam)).

The Commonwealth maintains, however, that a slight difference in Virginia law generates the opposite outcome here. Instead of insisting upon severance in every case, Virginia law creates a defeasible requirement of severance. It provides that a trial court in the situation here must sever the charges "unless the Commonwealth and defendant agree to joinder." *Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998). And according to the Commonwealth, a defendant who consents to severance of multiple charges when state law *favors* that procedure, but does not unequivocally *demand* it, waives his constitutional right to the issue-preclusive effect of an acquittal. The Solicitor General eschews the label "waiver" but likewise argues that a defendant relinquishes his ability to invoke issue preclusion by "voluntarily agree[ing]" to severance instead of a joint trial. U.S. Br. 6.

These arguments are misguided. Because issue preclusion does not necessarily bar a second trial, a defendant does not relinquish the right simply by consenting to two trials. And even if the

Commonwealth and Solicitor General were correct that the right to the issue-preclusive effect of an acquittal is nothing more in the double jeopardy context than a form of claim preclusion, a defendant would not waive that right by agreeing to severance in the circumstances here: Petitioner consented to severance to avoid undue prejudice to his right to a fair trial, and the prosecution retained its entitlement to one "full and fair opportunity" to prove allegations of criminal conduct. Indeed, by definition, the right to the preclusive effect of an acquittal applies only insofar as the prosecution has already tried and failed to prove the issue that the defendant seeks to foreclose from relitigation.

This Court should reverse and remand for an application of the issue preclusion doctrine.

ARGUMENT

I. A defendant who consents to successive trials does not waive his right to the issue-preclusive effect of an acquittal at the first trial.

A. There is no inconsistency between agreeing to separate trials and invoking the double jeopardy right to issue preclusion.

Nomenclature aside, neither the Commonwealth nor the Solicitor General quarrels over the substantive principle that governs here: A defendant can relinquish a double jeopardy right (like other constitutional rights) when he takes an action that is inconsistent with invoking the right. *See* Petr. Br. 26-28; Resp. Br. 35; U.S. Br. 19-20, 23-24.

But the Commonwealth and the Solicitor General argue that this standard—most easily conceptualized as establishing waiver by conduct—is met here.

Agreeing to separate trials, they maintain, *is* inconsistent with asserting the issue-preclusive effect of an acquittal because that right is nothing more than an "aspect" or "component" of the right against multiple trials. Resp. Br. 1, 28, 33; U.S. Br. 17-20. This contention is incorrect on both theoretical and practical levels.

1. As a theoretical matter, the double jeopardy right to the issue-preclusive effect of an acquittal cannot be understood as merely a strand of the right against multiple trials. The right against multiple trials—otherwise known as claim preclusion, *see Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357 (2016)—is concerned simply with "the heavy personal strain which a criminal trial represents for the individual defendant." *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). It is entirely indifferent to the outcome of a first trial: Even a defendant who is convicted in the first proceeding has a right not to be subjected to a second one.

Issue preclusion, as petitioner has explained, is directed at a separate concern: preserving the inviolacy of acquittals. Petr. Br. 13-15; *see also United States v. Scott*, 437 U.S. 82, 91 (1978). "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager v. United States*, 557 U.S. 110, 122 (2009). The issue preclusion doctrine thus ensures that a defendant's acquittal cannot be contradicted in a subsequent prosecution against him, lest the risk of a wrongful conviction rise to an unacceptably high level and the Constitution's commitment to the citizenry's participation in the criminal justice system be fatally undercut. *See* Br. of Cato Institute 12-19.

The Commonwealth suggests in response that "some acquittals" are not inviolate. Resp. Br. 25. But neither of the cases the Commonwealth cites for this proposition supports its position here. *Standefer v. United States*, 447 U.S. 10 (1980), involved the prior acquittal of someone other than the defendant seeking to invoke its preclusive effect. Accordingly, the case did not implicate the inviolacy of a defendant's own previous acquittal; indeed, Standefer did not even advance a double jeopardy claim. *Id.* at 22 n.16; *see also Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (issue preclusion applies only if previous litigation was "between the same parties"). *Bravo-Fernandez* dealt with the special problem of inconsistent verdicts, where an acquittal cannot stand for the rejection of any prosecutorial allegation because of a jury's simultaneous conviction. *See* 137 S. Ct. at 357, 362-63; *United States v. Powell*, 469 U.S. 57, 68 (1984). Here, by contrast, petitioner was not convicted of anything at his first trial. This case thus involves an individual's "unassailable" prior acquittal, just as in *Yeager*, 557 U.S. at 123, *Ashe*, and *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam).

The Commonwealth also harps on this Court's admonition that the Double Jeopardy Clause calls for a "guarded application" of the issue preclusion doctrine. Resp. Br. 22-26 (quoting *Bravo-Fernandez*, 137 S. Ct. at 358). But this principle pertains only to when a defendant may prevail on an issue preclusion argument—not to when he is permitted to advance such an argument in the first place. Only the latter question is presented here.

2. The issue preclusion doctrine also has decisively different practical consequences than the right against

multiple trials. Although the Solicitor General asserts (U.S. Br. 19-23) that issue preclusion is available only when it would completely bar a successive trial, issue preclusion in actuality can prevent relitigation of a previously rejected theory of criminal liability without completely barring a successive trial. Consequently, there is no logical inconsistency in consenting to severance and later invoking issue preclusion.

a. Start with this Court's canonical articulation of the right to the issue-preclusive effect of an acquittal: "[W]hen an issue of ultimate fact has once been determined by [an acquittal], *that issue* cannot again be litigated between the same parties." *Ashe*, 397 U.S. at 443 (emphasis added). The Court has repeatedly reaffirmed this description of the issue preclusion right. *See, e.g.*, *Bravo-Fernandez*, 137 S. Ct. at 356; *Yeager*, 557 U.S. at 119. If the effect of issue preclusion were necessarily that a "second trial cannot proceed," U.S. Br. 19, this Court's formulation would be a very strange way of saying that. Instead, this Court's pronouncements seem carefully drafted to establish the opposite rule—namely, that this branch of double jeopardy law bars the relitigation only of "issue[s]," *Bravo-Fernandez*, 137 S. Ct. at 359, that a previous verdict necessarily resolved in the defendant's favor.

Indeed, the Court in *Ashe* explicitly adopted a pre-existing federal doctrine that barred relitigation of issues, but not necessarily claims. *Ashe*, 397 U.S. at 443. The doctrine first developed in civil litigation, and no one denies that, in that context, issue preclusion regularly bars relitigation of an issue without barring an entire claim. *See* 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4416, at 424-25 (3d ed. 2016); Restatement (Second) of Judgments § 27, at 256

(1982). When this Court extended the doctrine to the criminal context, *see, e.g.*, *Sealfon v. United States*, 332 U.S. 575, 578 (1948), it did not limit the doctrine to cases in which a claim is barred. Nor did the Court impose such a limitation when it held that the doctrine was "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe*, 397 U.S. at 445.

Lest there by any doubt, *Ashe* itself relied on a case that squarely considered and rejected the contention the Solicitor General advances here. *Ashe*, 397 U.S. at 443 (citing *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961)). In *Kramer*, the Government alleged that the defendant participated in multiple post office burglaries with the same accomplices. At an initial trial, he was acquitted of perpetrating or aiding and abetting the burglaries. 289 F.2d at 912, 915. The Government subsequently tried him for (among other things) two additional offenses involving the possession of goods stolen during the burglaries. *Id.* at 912. At this second trial, the prosecution offered testimony "substantially identical" to that which it had presented at the first trial; in essence, it argued that Kramer obtained the stolen goods by participating in the burglaries. *See id.* at 915. This time, he was convicted.

On appeal, Kramer argued that his acquittal at the first trial should have precluded the Government from relitigating his alleged involvement in the burglaries. 289 F.2d at 912. The Government responded that issue preclusion was unavailable because involvement in the burglaries was not "an issue essential to a conviction in the second trial." *Id.* at 915. That is, the Government argued—just as the Solicitor General does here—that issue preclusion is available only if

barring relitigation of the previously litigated *issue* necessarily would bar the successive trial. *See id.*

Writing for the Second Circuit panel, Judge Friendly rejected this argument as "utterly captious." *Kramer*, 289 F.2d at 916. He reasoned (in a passage that warrants extended recitation):

> A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue. . . . [T]o permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment . . . . The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial . . . .

Id. at 915-16 (citations omitted). Accordingly, the Second Circuit reversed the convictions on the two charges related to the receipt of stolen goods and

ordered a new trial on those charges, instructing the lower court to "exclude all evidence which, if believed, would necessarily show Kramer to be a principal or an aider or abetter in the burglaries." *Id.* at 921.

Results like this are now commonplace. Summing up the current legal landscape, then-Judge Gorsuch explained for Tenth Circuit: The Double Jeopardy Clause's issue preclusion prong "precludes relitigation not only of ultimate issues [at a second trial] already determined by a final judgment" of acquittal; it sometimes merely "restrict[s] the proof the government might seek to use" at the second trial. *United States v. Wittig*, 575 F.3d 1085, 1096 (10th Cir. 2009). Accordingly, "[s]ometimes, a defendant will argue that collateral estoppel requires suppression of particular pieces of evidence, or the striking of a specific [theory] alleged in an indictment, because introduction of such evidence to prove the charges will trench on a previous judgment of acquittal." When the defendant's argument has merit, the double jeopardy right to the issue-preclusive effect of an acquittal "is deployed . . . to do something *other* than dismiss an indictment." *Id.* (emphasis in original).

b. The Solicitor General protests that barring relitigation of an issue but not a second trial conflicts with the Double Jeopardy Clause's text, which prohibits only "being tried twice for the 'same offence.'" U.S. Br. 19. But Judge Friendly's reasoning—and the modern practice following it—are sound. When the prosecution spins multiple charges out of the same episode and then relitigates a theory of liability that a jury already rejected, the defendant is effectively on trial a second time for the same offense—even if the new charge is formally distinct under *Blockburger v.*

United States, 284 U.S. 299, 304 (1932). By contrast, when the prosecution pursues the new charge using a theory of liability that has not yet been rejected, there is no double jeopardy violation because the defendant is truly on trial for a different offense.

The Solicitor General is similarly incorrect that *Dowling v. United States*, 493 U.S. 342 (1990), rejected the concept that the Double Jeopardy Clause's issue preclusion prong can "limit the evidence presented at a second trial, rather than prohibit the proceeding altogether." U.S. Br. 7; *see also id.* 20-22. *Dowling* does not sweep so broadly.

In *Dowling*, the Court "decline[d] to extend *Ashe*" to forbid the prosecution from introducing evidence, under Fed. R. Evid. 404(b), of a crime for which the defendant was acquitted but which was a separate criminal episode from the current charges. 493 U.S. at 348.[1] The charge for which Dowling was acquitted took place "approximately two weeks" after the events that gave rise to the second trial, and it involved different property, a different location, and different victims. *Dowling*, 493 U.S. at 344; *see also United States v. Felix*, 503 U.S. 378, 386 (1992) (stressing that the two crimes in *Dowling* were "unrelated"). In those circumstances, it could not be said that the defendant was being tried a second time for the same offense.

Here, by contrast, the two trials involved the same criminal episode—just as in *Kramer*, 289 F.2d at 916

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[1] Rule 404(b) bars the prosecution from introducing evidence of a defendant's past criminal or wrongful conduct "to prove [the defendant's] character to show that on a particular occasion the [defendant] acted in accordance with the character." Fed. R. Evid. 404(b)(1). But it sometimes allows the introduction of such evidence "for another purpose." Fed. R. Evid. 404(b)(2).

("same course of conduct"); *Ashe*, 397 U.S. at 446 ("same robbery"); *Yeager*, 557 U.S. at 119 ("same criminal episode"); and *Turner*, 407 U.S. at 368-69 ("the same set of facts, circumstances, and the same occasion"). That, as explained just above, is when issue preclusion kicks in to limit the prosecution's ability to prosecute someone twice for what is functionally the same offense. And the doctrine does not necessarily bar a second trial; it simply bars the prosecution "from relitigating any *issue* that was necessarily decided by [the] jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119 (emphasis added).

To be sure, the Court observed in *Dowling* that "unlike the situation in *Ashe*," Dowling's prior acquittal "did not determine an ultimate issue in the [second] case." 493 U.S. at 348. But contrary to the Solicitor General's assertion (U.S. Br. 21), the Court did not establish that as a categorical prerequisite for applying the issue preclusion doctrine. Instead, the Court held only that the Double Jeopardy Clause does not "exclude *in all circumstances*" otherwise admissible evidence "simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* (emphasis added).

Extending *Dowling* from the Rule 404(b) context in which it was decided to retrials involving the same course of previously acquitted conduct would not only be doctrinally improper and upend widely accepted practice across the federal courts; it would also lead to unacceptable results. Once again, Judge Friendly foresaw why in *Kramer*:

> On the Government's argument, if a postal inspector had been killed during one of the robberies [for which Kramer was acquitted],

> Kramer's acquittal would bar, as *res judicata*, a later prosecution for first-degree murder under 18 U.S.C. § 1114, since participation in a burglary would be an essential element of the crime, 18 U.S.C. § 1111; but, in a prosecution for second-degree murder or for manslaughter, the Government would be free . . . to repeat all the testimony about Kramer's presence on the scene which the [first] jury disbelieved, since it would not be essential for the Government to establish burglary in order to convict on the lesser charge.

289 F.2d at 916.

Put another way, if the issue preclusion doctrine were limited to subsequent trials in which the prosecution had no *theoretical* way to prove an element of the charged offense besides relitigating facts a prior jury rejected, then the doctrine would offer little meaningful protection. The prosecution can almost always conjure up a new charge respecting the same incident that does not necessarily require proving a fact the first jury necessarily rejected. Accordingly, the only way for the issue preclusion doctrine to serve its function is for it to be "set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Yeager*, 557 U.S. at 120 (quoting *Ashe*, 397 U.S. at 444). That requires barring the prosecution from relitigating factual allegations the jury necessarily rejected at the first

trial, even if the prosecution may legitimately proceed on a theory the first jury did not necessarily reject.[2]

c. Finally, even if the Solicitor General were right that the issue preclusion doctrine requires that the issue the defendant seeks to foreclose from relitigation be an "ultimate" one in the second proceeding as well as the first, it still would not follow that whenever issue preclusion applies, it bars a successive trial. Issues of ultimate fact depend on the theories and evidence actually advanced by the parties—in a second trial no less than in a first one. So even under the Solicitor General's view, the doctrine would work only to bar *particular ways* in which a second trial might proceed. *See, e.g.*, *Wittig*, 575 F.3d at 1091, 1097, 1099-1101.

Consider *Ashe* itself. There, the issue preclusion doctrine prevented the prosecution from arguing at the second trial that Ashe was "one of the robbers" who held up the poker players at gunpoint. 397 U.S. at 445. But if the prosecution at the second trial had

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[2] The Solicitor General is wrong that this conception of the issue preclusion doctrine is somehow inconsistent with allowing immediate appeals of orders denying motions to dismiss indictments on double jeopardy grounds. *See* U.S. Br. 18-19 (citing *Abney v. United States*, 431 U.S. 651 (1997)). When a defendant asserts that his right to the preclusive effect of an acquittal effectively "forbids a second trial" (at least under the particular prosecutorial theory laid out in an indictment), immediate review is indeed warranted. *E.g.*, *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam). But when a double jeopardy issue preclusion claim "would at most suppress some evidence but not preclude trial on the charge," all eight circuits to consider the issue have held that an interlocutory appeal is impermissible. *United States v. Wright*, 776 F.3d 134, 141 (3d Cir. 2015) (citing *Wittig*, among other cases).

endeavored to prove that Ashe waited outside during the robbery and then drove the getaway car, the issue preclusion doctrine would not have stood in the way of that trial.

This case also illustrates the point. With the benefit of hindsight, it is clear here that an ultimate issue from petitioner's first trial—his alleged participation in the break-in and theft of the safe—was also an issue of ultimate fact at his second trial. *See infra* at 22-24. But that was true only because the Commonwealth's theory of how petitioner came to possess the guns made it so. Petitioner's participation in the break-in would not have been an ultimate issue in the second trial if, for example, the Commonwealth had alleged that petitioner had been fishing in the river when Wood and some other accomplice showed up with the safe, and petitioner then helped them empty it out. But, of course, the Commonwealth presented no such theory. *See* J.A. 100-01.

In sum, even on the Solicitor General's view, issue preclusion does not necessarily operate—as claim preclusion does—to bar a successive trial. Rather, issue preclusion can bar only a subset of possible trials in which the prosecution rests its case on a theory of liability that a jury has already rejected. And that being so, merely consenting to successive trials is not inconsistent with—and thus does not foreclose—a defendant's later insisting upon the issue-preclusive effect of an acquittal.

B. Even if issue preclusion were nothing more in the double jeopardy context than a species of claim preclusion, the equities here would still preclude waiver.

The Commonwealth cannot dispute that even when it comes to the Double Jeopardy Clause's protection against multiple trials, defendants do not waive that protection when they have "no meaningful choice" but to consent to successive trials. Resp. Br. 40. Such is the case here. Thus, even if the right to the preclusive effect of an acquittal were simply a species of claim preclusion, defendants in petitioner's situation would still be entitled to assert that right—particularly because it would not unfairly affect the prosecution.

1. The Commonwealth implicitly accepts (as it must) that introducing evidence of a prior conviction in a trial at which that evidence is not an element of one or more charges presents a grave risk of undue prejudice. Petr. Br. 30; *see also* Br. of Indiana et al. 10 ("no denying" prospect of "unfair prejudice"); Br. of NACDL 9-16. But the Commonwealth argues for three reasons that this risk of prejudice is insufficient to prevent waiver here. None of these arguments succeeds.

a. The Commonwealth claims that potential prejudice prevents a double jeopardy waiver only when a defendant is "forced to choose between competing *constitutional* rights." Resp. Br. 40 (emphasis added); *see also* U.S. Br. 28 (stressing that Virginia does not deem severance under the circumstances here to be "constitutionally compelled"). Not so. In *Green v. United States*, 355 U.S. 184 (1957)—the foundational "no meaningful choice" case

in the double jeopardy context—the Court held that when a defendant appeals a conviction and requests a new trial, he does not waive the defense of former jeopardy to a second prosecution on a greater charge. *Id.* at 191-93. Yet "[t]here is, of course, no constitutional right" to appeal a criminal conviction. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The right is "purely a creature of statute." *Abney v. United States*, 431 U.S. 651, 656 (1977).

Sanabria v. United States, 437 U.S. 54 (1978), reinforces the reasoning and holding of *Green*. There, the Court held that filing a mid-trial evidentiary motion, which the trial court improperly granted (and that caused an acquittal), did not waive the right against multiple trials. *Id.* at 78. The Court did not pause to ask whether the defendant had a constitutional right to file that particular motion (much less to an erroneous ruling on it). This precedent also explains why even the plurality in the case the Commonwealth propounds—*Jeffers v. United States*, 432 U.S. 137 (1977)—acknowledged that the result there might have been different if a joint trial would have caused "undue prejudice" to the defendant's constitutional right to a fair trial. *Id.* at 153. "Undue prejudice" to the right to a fair trial is not the same thing as a violation of it. Indeed, if Jeffers had faced the problem petitioner faced here—the prospect of "prejudicial evidence" being "introduced at his trial"—he would not necessarily have waived his double jeopardy rights by requesting two trials. *Id.* at 153 & n.21.

Nothing about this Court's rejection of the double jeopardy claim in *United States v. Dinitz*, 424 U.S. 600 (1976), undercuts this analysis. In that case, the

defendant requested a mistrial (and, thus, effectively a second trial) to avoid completing a trial in which the judge had improperly expelled his lead counsel from the courtroom. *Id.* at 603-05, 608-09 n.10. Going forward in the first trial ultimately would not have caused Dinitz significant prejudice. Even if he were to have been convicted, the trial court's error would have allowed him to obtain "a reversal of the conviction, and a later retrial." *Id.* at 610. By contrast, had petitioner agreed here to a joint trial, he could not have obtained any such reversal or retrial based on the highly prejudicial admission of his prior convictions.

In any event, even Dinitz was not forced, as the price of requesting a mistrial, to forego his right to the issue-preclusive effect of any later acquittal. As the Court subsequently made clear, "[i]t cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." *Burks v. United States*, 437 U.S. 1, 17 (1978). The Court should not hold to the contrary for the first time here.

b. The Commonwealth also suggests petitioner could have "mitigate[d]" the prejudice he would have suffered in a joint trial by taking one of two steps. Resp. Br. 42-43. Neither suggested maneuver, however, pans out.

The Commonwealth first suggests that a defendant in petitioner's shoes could offer to "stipulate that he is a felon within the meaning of the statutory offense." Resp. Br. 42. But even if a court and the prosecution would be required to accept such a stipulation (something the Commonwealth declines to concede, *see* Resp. Br. 42 & n.6), this action would require a defendant to surrender his constitutional

right to require the prosecution "prove every element of a criminal offense beyond a reasonable doubt," *Sandstrom v. Montana*, 442 U.S. 510, 512 (1979); *see also Neder v. United States*, 527 U.S. 1, 12 (1999). And even the Commonwealth acknowledges that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." Resp. Br. 41 (quoting *Simmons v. United States*, 390 U.S. 377, 394 (1968)).[3]

The Commonwealth's second suggestion—that "the defendant could ask the court to give a limiting instruction," Resp. Br. 43—fares no better. This Court has long recognized that when evidence is sufficiently prejudicial, the "assumption that prejudicial effects can be overcome by instructions to the jury" is "naive" and one that "all practicing lawyers know to be unmitigated fiction." *Bruton v. United States*, 391 U.S. 123, 129, 131 (1968) (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)). Such is the case here. "To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994) (internal citation omitted);

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[3] The notion that a defendant could resolve the dilemma here by agreeing to a bench trial (U.S. Br. 28) suffers from the same flaws. A defendant may not have the ability to insist unilaterally upon a bench trial. *See Singer v. United States*, 380 U.S. 24, 26 (1965); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942). And even if he does, requiring him to request a bench trial forces him to relinquish the Sixth Amendment right to trial by jury.

accord United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir. 1986); *United States v. Carter*, 482 F.2d 738, 740-41 (D.C. Cir. 1973). The problem is all the more pronounced where—again, as here—the prior convictions are for the same type of conduct for which the defendant is being tried. *See, e.g., Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.).

c. The Commonwealth lastly argues that the fact that petitioner had "full knowledge" when he consented to severance "that [he might] be acquitted during the first trial," Resp. Br. 2, impedes his ability now to invoke his double jeopardy rights. But foreseeability that a defendant might procure an acquittal is immaterial. In *Green* and *Burks*, a favorable ruling on appeal was certainly foreseeable. And in *Sanabria*, an acquittal following a ruling on the defendant's mid-trial motion was foreseeable. The Court nevertheless refused in those cases to hold that the defendants waived their double jeopardy rights. Those cases control here.

2. The equities preclude waiver here not just because petitioner would have suffered undue prejudice at a joint trial but also because petitioner's assent to severance accorded with Virginia's preference as well.

Recall that in *Turner*, this Court held that issue preclusion was available in a second trial where state law prohibited trying the two charges together. 407 U.S. at 366-68. There is no doubt, therefore, that petitioner would be entitled to invoke issue preclusion if Virginia—like, say, Nevada—"required" severance whenever "the State seeks convictions on multiple counts, including a count of possession of a firearm by

an ex-felon," *Brown v. State*, 967 P.2d 1126, 1131 (Nev. 1998).

The Solicitor General seeks to distinguish this case on the ground that "[p]etitioner had the option to try his factually related counts in one proceeding, but he chose instead to stand trial on them separately." U.S. Br. 9; *see also id.* 12 (likening this case to *Jeffers*, where the defendant was "*solely* responsible for the successive prosecutions") (quoting *Jeffers*, 432 U.S. at 154 (plurality opinion)) (emphasis added). This argument misapprehends Virginia law. While petitioner consented to severance, he did *not* have the unilateral ability to demand a joint trial; the Commonwealth would also have had to agree to joinder. *See Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998). And in petitioner's case, the Commonwealth, too, sought severance. *See* J.A. 47, 48.

For its part, the Commonwealth's position is that this case is different from *Turner* because Virginia law does not compel severance; it merely creates a strong presumption in favor of that mode of proceeding, *see supra* at 1. But this minor variation in state law has no import. Virginia—just like Nevada—has decided that the interests of "justice" are best served in this situation by severance. *Hackney*, 504 S.E.2d at 388; *see also Brown*, 967 P.2d at 1131 (requiring severance "to ensure fairness"). And by agreeing to severance, petitioner enabled the Commonwealth to use its preferred procedure, just as the prosecution was able to do in *Turner*.

Nor, contrary to the Commonwealth's related argument, does it matter that a defendant in petitioner's situation "obtain[s] a benefit" from

severance, Resp. Br. 39—namely, avoiding the serious risk that the jury will "prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge," *Michelson v. United States*, 335 U.S. 469, 476 (1948). Again, *Turner* forecloses this argument: The defendant there similarly benefitted from severance. *See* Petr. Br. 19 n.1. At any rate, severance benefits both parties in the circumstances here, not just defendants. The government, just like the defense, has a vital "interest in the accuracy and justice of criminal results," *Standefer v. United States*, 447 U.S. 10, 25 (1980) (citation omitted). The prosecution "wins its point *whenever* justice is done its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (quoting an inscription on the walls of the Department of Justice) (emphasis added).[4]

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[4] For this reason, there is no cause for concern that "[a]pplying issue preclusion to cases like Currier's will deter the use of severance," Br. of Indiana et al. 16. Florida, for instance, has for decades allowed defendants in petitioner's situation to invoke issue preclusion. *See Gragg v. State*, 429 So. 2d 1204, 1208 (Fla. 1983), *cert. denied*, 464 U.S. 820 (1983). Yet Florida courts still routinely sever changes in these circumstances. *See, e.g.*, *State v. Joy*, 221 So. 3d 1281, 1282 (Fla. 2017) (felon-in-possession charge severed); *State v. Brice*, 192 So. 3d 692, 693 (Fla. Dist. Ct. App. 2016) (same); *Jackson v. State*, 183 So. 3d 1211, 1212 (Fla. Dist. Ct. App. 2016) (same); *Dorelus v. State*, 154 So. 3d 1206, 1208 (Fla. Dist. Ct. App. 2015) (same); *Jones v. State*, 120 So. 3d 135, 136 (Fla. Dist. Ct. App. 2013) (same). The same is true in Iowa, which adopted petitioner's position in *State v. Butler*, 505 N.W.2d 806, 810 (Iowa 1993). *See, e.g.*, *Pettit v. State*, 2015 WL 576030, at *1 (Iowa Ct. App. 2015) (same); *Rankins v. State*, 2014 WL 1494898, at *5 (Iowa Ct. App. 2014); *State v. Hoover*, 2013 WL 4506511, at *1 n.1 (Iowa Ct. App. 2013) (same).

That leaves the Commonwealth's complaint that allowing petitioner to invoke issue preclusion here would "deny the Commonwealth 'its right to one full and fair opportunity to convict those who have violated its laws.'" Resp. Br. 39 (quoting *Ohio v. Johnson*, 467 U.S. 493, 502 (1984)). Yet petitioner has already explained that the "full and fair opportunity" principle "is no way imperiled here. Issue preclusion, by its very nature, extends only to issues that the prosecution has fully litigated and that were necessarily decided against it." Petr. Br. 32. In other words, petitioner is not seeking to invoke issue preclusion as a sword—only as a shield to prevent the Commonwealth from relitigating allegations the jury rejected at the first trial.

The Commonwealth offers no response to this explanation. And this reality cements the fairness of allowing petitioner to insist upon the issue-preclusive effect of his acquittal.

II. The Commonwealth's contention that it did not relitigate any issue of ultimate fact is irrelevant and incorrect.

Roaming beyond the question presented, the Commonwealth asks for an affirmance on the alternative ground that it did not relitigate any issue of ultimate fact at petitioner's second trial. Resp. Br. 43-51. This Court should not consider this argument. If for some reason the Court were to address the argument, it should reject it.

1. This Court's customary practice is to resolve constitutional issues and then leave it to lower courts in the first instance to apply the law to the facts of the case. *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017); *Peña-Rodriguez v. Colorado*, 137 S. Ct.

855, 870-71 (2017). There is no reason to deviate from that practice here. The trial court found that the Commonwealth relitigated allegations in the second trial that the jury in the first trial necessarily rejected. *See* J.A. 101. As the trial court put it: "[T]he connection between the larceny, the guns, and safe act as one final essential element. If [the jurors at the first trial] didn't find him guilty of the safe, they didn't find him guilty of the guns." J.A. 101.

But the Virginia appellate courts have not considered the Commonwealth's argument disputing that determination. *See* Pet. App. 1a, 10a n.1. Accordingly, the most sensible disposition would be to remand for such consideration. *See Yeager v. United States*, 557 U.S. 110, 125-26 (2009).

2. At any rate, petitioner's second trial did indeed violate the Double Jeopardy Clause's issue preclusion doctrine.

The Commonwealth cannot seriously dispute that the first jury necessarily rejected the allegation that petitioner participated in the theft of the safe. Resp. Br. 50-51.[5] What is more, the Commonwealth admitted below—and the trial court agreed—that the prosecution relitigated that very issue in the second

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[5] The Commonwealth muses in a lone footnote that the first jury "could have concluded that Petitioner unwittingly helped Wood steal the safe, believing Wood had permission to take his uncle's property." Resp. Br. 51 n.7. But petitioner never made the slightest such contention at the first trial. Instead, he maintained that he "did not participate at all" in the crime. Trial Tr. 89. And the Commonwealth agreed in its closing argument that "only one issue and one issue alone" was "in dispute": whether petitioner "was involved in the offense." J.A. 35.

trial. VA Jt. App. 571; J.A. 101; *see also* Petr. Br. 6 (recounting evidence).

The Commonwealth nevertheless argues that it did not violate the Double Jeopardy Clause at the second trial because the felon-in-possession charge turned exclusively on whether petitioner handled the guns during the moments when he helped dispose of the stolen safe. Resp. Br. 48.

This contention misapprehends how the Double Jeopardy Clause's issue preclusion doctrine works. The relevant inquiry is not the "hypertechnical" one the Commonwealth imagines. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Instead, the inquiry is a "practical" one that hinges on "realism and rationality." *Id.* (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). If the jury at the first trial rejected a factual allegation that the prosecution advanced—or at least one that a "rational jury" would need to believe in order to convict—at the second trial, then the second trial contravened the Double Jeopardy Clause. *Id.* (quoting *Sealfon*, 332 U.S. at 579).

That limitation was transgressed here. The gun safe weighed over 700 pounds; it was so heavy that it could not "be moved [by] one person." J.A. 94. And the only person the Commonwealth ever suggested assisted Wood with the crimes was petitioner. Consequently, the jury at the second trial had to believe the Commonwealth's claim that petitioner helped Wood lift the safe and steal it from the Garrison's home. As the Commonwealth itself explained to the trial judge: "It's *impossible* for the jury to understand how we get a safe in the river without the—and how we connect Mr. Currier to the safe in the river without that prior, that prior

involvement there in the house." J.A. 57 (emphasis added); *see also id.* 100-01 (trial judge recognizing that "the guns being accessed by Mr. Currier" depended upon proving "the larceny" allegation).

In short, there is only one realistic and rational interpretation of the jury's acquittal: It determined that petitioner did *not* help steal the safe. Nevertheless, the Commonwealth advanced a factual theory in the second trial that depended on proving this very allegation. In so doing, it violated petitioner's double jeopardy right to the issue-preclusive effect of an acquittal.

CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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No. 16-1348

In the Supreme Court of the United States

MICHAEL NELSON CURRIER, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioner, who expressly consented to two separate trials on distinct charges arising from the same set of facts, may invoke the issue-preclusion component of the Double Jeopardy Clause to bar or limit the second trial.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a defendant who expressly consents to severance of multiple charges into sequential trials may later invoke the issue-preclusion component of the Fifth Amendment's Double Jeopardy Clause to bar or limit the second trial. The resolution of that question will affect federal criminal cases because the Double Jeopardy Clause applies to the federal government and Federal Rule of Criminal Procedure 14(a) permits a federal judge to order separate trials of counts against a single defendant when joinder of the offenses would be prejudicial to either the defendant or the government.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

Following a jury trial in the Circuit Court for the County of Albemarle, petitioner was convicted on one count of possession of a firearm by a felon, in violation of Va. Code Ann. § 18.2-10 (2009); *id.* § 18.2-308.2 (Supp. 2012). J.A. 6, 99. He was sentenced to five years of imprisonment. Pet. App. 5a. The Court of Appeals of Virginia and the Supreme Court of Virginia affirmed. *Id.* at 1a, 2a-13a.

1. On March 7, 2012, a break-in occurred at the home of Paul and Brenda Garrison in Albemarle County, Virginia. A large gun safe containing approximately $70,000 in cash, personal papers, and 20 guns was stolen from the home. The safe was later located in the Rockfish River in Nelson County, Virginia. When police recovered the safe, the lock mechanism had been destroyed and removed. The safe still contained the 20 firearms, but the cash was gone. Pet. App. 3a; see Pet. 3; Br. in Opp. 1.

A police investigation identified Bradley Wood, the Garrisons' nephew, as a suspect. Wood implicated petitioner as an accomplice in the crime. Pet. App. 3a. In addition, a neighbor who had been at home on the day of the break-in identified petitioner as one of the passengers in a pickup truck she had seen exiting the Garrisons' driveway after hearing "a lot of 'loud banging' and 'loud noises' coming from the Garrison residence." *Ibid.* A cigarette butt recovered from the truck contained petitioner's DNA. *Id.* at 4a.

A state grand jury indicted petitioner for breaking and entering the Garrisons' home, grand larceny, and possession of a firearm by a convicted felon. Pet. App. 4a; see J.A. 48-49. The firearm charge was based on the allegation that petitioner and Wood had opened the safe

at the river and that petitioner handled the guns while removing the cash. Pet. 4; Br. in Opp. 3-4, 11.

2. Before trial, petitioner and the prosecution agreed to sever the felon-in-possession charge from the other two charges. Pet. App. 4a. Virginia courts have interpreted state-court rules to require that "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Hackney* v. *Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) (en banc); see Va. Sup. Ct. R. 3A:6(b), 3A:10. They have recognized, however, that the procedure is not based in either the state or federal constitutions. See *Commonwealth* v. *Smith*, 556 S.E.2d 223, 225-227 & n.2 (Va. 2002) (treating due process challenge as distinct from any argument concerning Rule 3A:10(c)); *Purvis* v. *Commonwealth*, 522 S.E.2d 898, 902 (Va. Ct. App. 2000) ("Because appellant alleges only a violation of Rule 3A:10, we apply the standard for determining whether non-constitutional error is harmless.").

Petitioner was tried first on the breaking-and-entering and larceny charges. Br. in Opp. 3; see J.A. 47 (joint motion of the Commonwealth and petitioner "to continue the Felon in Possession of a Firearm trial" until after completion of the first trial). A jury acquitted petitioner of those counts. Pet. App. 4a.

3. Petitioner subsequently claimed that the Double Jeopardy Clause imposed a barrier to the second of the two trials. Pet. App. 5a; see J.A. 47. In his view, the jury at the first trial had necessarily concluded that he was not present at the Garrisons' home. Va. Sup. Ct.

App. 291.[1] He contended that the second trial, which necessarily involved the same set of facts, should therefore not be allowed to proceed, or, in the alternative, that the prosecution should be precluded from introducing "any evidence of [his] alleged involvement in the theft and burglary at the Garrisons' home." *Ibid.*; see *id.* at 286-293.

The trial court denied petitioner's motions. Pet. App. 5a. It reasoned that while the Double Jeopardy Clause "prevents the Commonwealth * * * from using the prosecution of a minor offense as * * * a dress rehearsal for a more serious later prosecution" or "subjecting the accused to the hazards of vexatious multiple prosecutions," such "concerns are not applicable in this case." J.A. 50-51. The court observed that petitioner's charges had been tried separately not because of prosecutorial overreaching but because, under state rules, his consent to severance meant that they could not be tried simultaneously. J.A. 51.

A jury found petitioner guilty of unlawful possession of a firearm by a felon, and he was sentenced to five years of imprisonment. Pet. App. 5a.

4. The Court of Appeals of Virginia affirmed. Pet. App. 2a-13a.

The state court of appeals noted that because "the crime of possessing a firearm as a convicted felon is not the 'same offense' as burglary or larceny[,] * * * a plain language reading of the [Double Jeopardy Clause] would lead to the conclusion that [petitioner] could be tried on the firearm charge after acquittal on the other charges." Pet. App. 6a. It recognized, however, that this Court has interpreted the Double Jeopardy Clause

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[1] Va. Sup. Ct. App. refers to the Appendix filed in the Supreme Court of Virginia in No. 160102.

to incorporate a "collateral estoppel doctrine" under which a later prosecution for a separate offense may be barred by an earlier jury determination of an "'ultimate fact'" in the defendant's favor. *Id.* at 7a (quoting *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970)). But it explained that the Double Jeopardy Clause "is not 'simply res judicata dressed in prison grey.'" *Ibid.* (quoting Notes & Comments, *Twice in Jeopardy*, 75 Yale L.J. 262, 277 (1965)). "Its aim," the court reasoned, "is to prevent 'oppressive practices' by the prosecution." *Ibid.* (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)).

The state court of appeals determined that this case involved none of the "prosecutorial overreaching" with which the Double Jeopardy Clause is concerned. Pet. App. 9a (citation omitted). The charges were "brought on the same date by the same grand jury," and one was "severed for the benefit of the defendant and with his consent." *Id.* at 8a. Petitioner thus could not rely on the issue-preclusion aspect of the Double Jeopardy Clause "as a sword to prevent the State from completing its prosecution on the remaining charge[]." *Id.* at 9a (quoting *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984)); see *id.* at 10a.[2]

5. The Supreme Court of Virginia summarily affirmed "for the reasons stated in the opinion of the Court of Appeals." Pet. App. 1a.

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[2] In light of its holding, the state court of appeals declined to address the Commonwealth's alternative argument that the two sets of charges were factually distinct, such that even if issue preclusion were applicable, petitioner's acquittal on the breaking-and-entering and larceny charges did not necessarily preclude a finding of guilt on the felon-in-possession charge. See Pet. App. 10a n.1; Resp. Br. 14.

SUMMARY OF ARGUMENT

A defendant who voluntarily agrees to sever multiple charges arising from a common set of facts into separate trials cannot invoke the issue-preclusion component of the Double Jeopardy Clause to bar the prosecution or limit the evidence introduced at his second trial.

A. The Double Jeopardy Clause's protection against being "twice put in jeopardy" for the "same offence," U.S. Const. Amend. V, guards against government oppression in the form of multiple trials designed to give the government repeated opportunities to convict a defendant of the same crime. It does not relieve a defendant of the foreseeable consequences of his own voluntary litigation choices. For example, the Court has held that if a defendant asks for and obtains severance of two charges into separate trials and is convicted at the first, he has no right under the Double Jeopardy Clause to bar the second trial on the ground that the charges are for the "same offence" because one is a lesser-included offense of the other. *Jeffers* v. *United States*, 432 U.S. 137, 150-152 (1977) (plurality opinion); see *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984).

B. A defendant who has consented to two trials and is acquitted, rather than convicted, at the first trial does not acquire any double-jeopardy right to bar or limit the second trial. The issue-preclusion component of the Double Jeopardy Clause protects acquittals by treating even legally distinct charges as the "same offence" where the defendant's acquittal on the first charge necessarily reflects the prosecution's failure to prove an "ultimate fact" required for conviction on the second charge. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). But that doctrine modifies only the meaning of "same of-

fence" following an acquittal. It does not free a defendant from his own litigation choices or create a freestanding right to avoid the consequences of those decisions. As this Court has held, a defendant who has agreed to multiple trials on related charges cannot invoke the Double Jeopardy Clause to assert that he is being impermissibly subjected to multiple trials for the "same offence."

Petitioner suggests that the issue-preclusion component of the Double Jeopardy Clause is distinct from the protection against multiple trials. That is incorrect. Because issue preclusion's sole double-jeopardy function is to modify the definition of the "same offence" in multiple-trials analysis, it is part of the multiple-trials protection, not distinct from it. Indeed, this Court's decisions have treated it as such. The only remedy that this Court has ever provided or suggested would be appropriate for a claim invoking issue preclusion is a prohibition of the second trial. And in the federal system, an issue-preclusion claim, like any other double-jeopardy claim, is subject to interlocutory appeal because it raises the right not to be tried twice for the "same offence," a right that is best vindicated before the second trial occurs. This Court also has specifically rejected the argument, made by petitioner here, that the Double Jeopardy Clause's issue-preclusion component might simply limit the evidence presented at a second trial, rather than prohibit the proceeding altogether. *Dowling* v. *United States*, 493 U.S. 342, 347-350 (1990).

The Court's decisions holding that the Double Jeopardy Clause is not violated when a defendant faces a second trial due to his own litigation decisions do not depend on the concept of "waiver." Instead, the Court has held that the Double Jeopardy Clause confers no

protection when a defendant's voluntary choice logically entails a second trial. Even if waiver analysis applied, however, the result would be the same. A defendant who elects two trials arising from the same set of facts, and is then subject to two trials arising from the same set of facts, receives exactly what he agreed to.

C. The foregoing principles prevent petitioner from invoking the Double Jeopardy Clause's issue-preclusion component to bar or limit the second trial to which he consented in this case. Petitioner's charges arose from a series of events that took place on a single day. When he consented to sever the charges for his own benefit, he necessarily agreed to a full second proceeding that might include similar evidence as, but yield a different outcome from, the first.

Petitioner's contention that he faced a difficult choice—between a single trial in which some information about his criminal record would reach the jury and two trials in which one jury might acquit while the other found him guilty—does not entitle him to a different result. In the double-jeopardy context, as in other criminal-procedure contexts, this Court has rejected the argument that simply because a defendant faces a difficult choice, he should be relieved of the consequences of his decision. And petitioner did not face an unresolvable dilemma here. Although Virginia case law gave him the option of separate trials, that option was not constitutionally compelled, and it is not the norm in many jurisdictions, including the federal system. Petitioner might have elected a single trial while requesting any one of a number of procedures to limit any prejudice from his prior convictions. Petitioner's decision to instead seek separate trials does not relieve him of the consequences of that voluntary choice.

ARGUMENT

A DEFENDANT WHO CONSENTS TO TWO TRIALS CANNOT INVOKE THE DOUBLE JEOPARDY CLAUSE TO BAR OR LIMIT THE SECOND TRIAL

Petitioner was not entitled to invoke the Double Jeopardy Clause to prohibit or constrain a second trial to which he had voluntarily consented. Petitioner had the option to try his factually related counts in one proceeding, but he chose instead to stand trial on them separately. The inevitable and foreseeable consequence of that choice was two factually overlapping trials at which the juries might reach different outcomes. Although Virginia's state-law rule permitted petitioner to request a severance, the Constitution did not guarantee him the right to obtain separate trials on separate offenses, yet claim that the issue-preclusion component of the Double Jeopardy Clause rendered those offenses the "same" and thereby precluded or limited the second trial. U.S. Const. Amend. V.

A. The Double Jeopardy Clause Does Not Relieve A Defendant Of The Consequences Of His Own Litigation Choices

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Clause affords a defendant three basic protections: it "protects against a second prosecution for the same offense after acquittal"; it "protects against a second prosecution for the same offense after conviction"; and it "protects against multiple punishments for the same offense." *Ohio* v. *Johnson*, 467 U.S. 493, 498 (1984) (quoting *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977)) (cita-

tion omitted). The Clause does not, however, bar a second trial when "the defendant consents to a disposition that contemplates reprosecution." *Evans* v. *Michigan*, 568 U.S. 313, 326 (2013).

1. The Double Jeopardy Clause "guards against Government oppression." *United States* v. *Scott*, 437 U.S. 82, 99 (1978). It "forbids a second trial *for the purpose of* affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978) (emphasis added). At the same time, the Double Jeopardy Clause does not create "an insuperable obstacle to the administration of justice * * * in * * * cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U.S. 684, 688-689 (1949).

The Court has repeatedly applied that principle to hold that the Double Jeopardy Clause does not relieve a defendant of the consequences of his own voluntary litigation choices. In *United States* v. *Dinitz*, 424 U.S. 600 (1976), for example, the defendant sought to prohibit a second trial after the trial judge excluded his lead counsel, and the defendant sought and obtained a mistrial. *Id.* at 601-605. The Court held that the defendant could be retried. *Id.* at 611-612. "[W]hen a defendant persuades the court to declare a mistrial," the Court recognized, "jeopardy continues and retrial is generally allowed." *Evans*, 568 U.S. at 326. The Court observed that "the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared *without* the defendant's request or consent depends on whether 'there is a manifest necessity for the mistrial, or the ends of public justice would otherwise be defeated.'" *Dinitz*, 424 U.S. at 606-607

(quoting *Illinois* v. *Somerville*, 410 U.S. 458, 461 (1973)) (emphasis added; brackets and citations omitted). But "[d]ifferent considerations obtain * * * when the mistrial has been declared at the defendant's request." *Id.* at 607. The Court reasoned that "the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial," and "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *Ibid.* (citation omitted).

The plurality opinion in *Jeffers* v. *United States*, 432 U.S. 137 (1977), which this Court has recognized to reflect the holding in that case, see *Johnson*, 467 U.S. at 502, similarly concluded that the Double Jeopardy Clause poses no bar to successive prosecutions if it is the *defendant* who "elects to have the two offenses tried separately and persuades the trial court to honor his election," 432 U.S. at 152; see Pet. Br. 25 n.2 (acknowledging that "subsequent cases treat *Jeffers* as having established th[e] general principle" that "a defendant who is solely responsible for causing multiple trials on greater and lesser-included offenses waives his right to have those offenses tried together") (emphasis omitted). The defendant in *Jeffers* was charged in separate indictments with offenses that the Court later recognized to be the "same" for double-jeopardy purposes (because one was a lesser-included offense of the other, see 432 U.S. at 147-151 (plurality opinion)), but he successfully opposed the government's motion to try the offenses together. *Id.* at 142-143. The plurality in *Jeffers*

found "no violation of the Double Jeopardy Clause" when a "defendant expressly asks for separate trials," is convicted of a lesser-included offense in the first trial, and is then tried on a greater offense in the second proceeding. *Id.* at 152.

In *United States* v. *Scott*, *supra*, the Court similarly held that a defendant "suffers no injury cognizable under the Double Jeopardy Clause" when he "deliberately choos[es] to seek termination of the proceedings against him" on the basis of pre-indictment delay and then is retried following a successful government appeal. 437 U.S. at 98-99. And in *Ohio* v. *Johnson*, *supra*, the Court held that a defendant may not plead guilty to a lesser-included offense and then assert that the Double Jeopardy Clause should bar trial on a greater offense. 467 U.S. at 494. The Court reasoned that the defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.* at 502.

2. The Court's holdings in *Dinitz*, *Jeffers*, *Scott*, and *Johnson* are grounded in the principle that a defendant "suffers no injury cognizable under the Double Jeopardy Clause" when he is faced only with the "consequences of his voluntary choice." *Scott*, 437 U.S. at 99. Where a defendant is "solely responsible for the successive prosecutions," nothing has "deprived him of any right that he might have had against consecutive trials." *Jeffers*, 432 U.S. at 154 (plurality opinion). The Double Jeopardy Clause "guards against Government oppression," *Scott*, 437 U.S. at 99, not a defendant's voluntary choices. Because no oppressive practices exist when a defendant himself can choose whether he will face one trial or two, see *Dinitz*, 424 U.S. at 607-609, such a cir-

cumstance presents "none of the governmental overreaching that double jeopardy is supposed to prevent," *Johnson*, 467 U.S. at 502.

Even when a trial has been "tainted by prejudicial judicial or prosecutorial error," the "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *Dinitz*, 424 U.S. at 609. The defendant himself is in the best position to decide whether "the interests served by the Double Jeopardy Clause," namely, "the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions," *id.* at 608, are outweighed by other considerations. Thus, even where a defendant is otherwise "entitled to have [his] charges * * * resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers*, 432 U.S. at 152 (plurality opinion).

B. A Defendant Who Has Consented To Two Trials Cannot Rely On The Outcome Of The First Trial To Prohibit Or Limit The Second Proceeding

Petitioner contends (Br. 13-17, 26-28), that a different rule applies when a defendant is acquitted, rather than convicted, at his first trial. But the principle that the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice," *Scott*, 437 U.S. at 99, governs irrespective of the first trial's outcome. A defendant who consents to severance of a factually related charge into a second trial does not thereby force the prosecution to prevail twice in order to convict him of the severed offense.

1. The double-jeopardy implications of a defendant's consent to two trials do not depend upon conviction at the first trial

The Court's holding in *Jeffers* forecloses "a defendant's claim of double jeopardy based upon a guilty verdict in the first of two successive prosecutions, when the defendant [was] responsible for insisting that there be separate rather than consolidated trials." *Johnson*, 467 U.S. at 502. A claim of double jeopardy based on an acquittal is similarly foreclosed in that circumstance. As the Court has recognized, the Double Jeopardy Clause's general bar on "'repeated attempts to convict an individual for an alleged offense'" "is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *Scott*, 437 U.S. at 95-96 (citations omitted).

Although the Double Jeopardy Clause "attaches particular significance to an acquittal," *Scott*, 437 U.S. at 91; see Pet. Br. 13, it does so in two specific ways. First, while a defendant who successfully challenges his conviction on appeal generally may be tried a second time, an acquittal—no matter how "mistaken"—bars retrial completely on the same charge. *Scott*, 437 U.S. at 91; see *id.* at 91-92.[3] That principle is not relevant to a case

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[3] The Court recognized an exception to the general rule that a defendant's successful appeal permits retrial in *Burks* v. *United States*, *supra*, which held that the Double Jeopardy Clause precludes a second trial when a defendant obtains a reversal of his conviction for evidentiary insufficiency. 437 U.S. at 18. Petitioner errs in citing (Br. 24) *Burks* for the proposition that "even if a defendant waives the right against multiple trials by requesting a retrial, he does not also waive the right to the finality of an acquittal." *Burks* addressed the proper scope of appellate relief, not the effect of affirmatively consenting to multiple trials. The Court reasoned that following a successful appeal on evidentiary insufficiency, "the only

like this, in which a defendant was tried separately on legally distinct charges. See *United States* v. *Dixon*, 509 U.S. 688, 696-697 (1993) (treating charges as legally distinct for double-jeopardy purposes where each includes an element distinct from the other) (citing *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)); Pet. App. 6a (noting that charges in this case are legally distinct).

Second, while a prior conviction bars only reprosecution for an offense that is *legally* the same, "'a constitutional policy of finality for the defendant's benefit' * * * protects the accused from attempts to relitigate" the ultimate facts determined by a prior acquittal. *Brown*, 432 U.S. at 165 (quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)); see *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). The Double Jeopardy Clause accomplishes this result by borrowing from civil law certain aspects of "collateral estoppel" or "issue preclusion." *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 356-358 & n.1 (2016). Under the incorporated issue-preclusion principles, "it is appropriate to treat [separate] charges as the 'same offence'" when a prior acquittal on one charge necessarily reflects the failure to prove an "ultimate fact" that would also be necessary to prove the other charge. *Yeager* v. *United States*, 557 U.S. 110, 119 (2009); see *Black's Law Dictionary* 711 (10th ed. 2014) (defining an "ultimate fact" as "[a]

'just' remedy * * * is the direction of a judgment of acquittal," even if the defendant "sought a new trial as one of his remedies, or even as the sole remedy." 437 U.S. at 17-18. *Burks* thus declined to interpret the defendant's request for a lesser form of appellate relief (a new trial) as foreclosing a grant of greater appellate relief (a directed judgment of acquittal). It did not address whether a defendant may agree to two trials and then seek to rely on a jury acquittal in the first trial to preclude the second.

fact essential to the claim or the defense"); see also *Bobby* v. *Bies*, 556 U.S. 825, 835-836 (2009) (similar). This Court first held that the Double Jeopardy Clause includes an issue-preclusion component in *Ashe* v. *Swenson*, *supra*, in which it concluded that the State could not bring sequential prosecutions for the legally distinct armed robberies of different victims at the same poker game, where the jury at the first trial had "determined by its verdict" of acquittal the "ultimate fact" "that the [defendant] was not one of the robbers." 397 U.S. at 443, 446.

The issue-preclusion component of the Double Jeopardy Clause has no application to a second trial that a defendant has voluntarily chosen. Issue preclusion acts to "prevent" "unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10; see *Johnson*, 467 U.S. at 500 n.9 ("[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."). It does so by modifying the circumstances in which a second prosecution is considered a prosecution for the "same offence." *Yeager*, 557 U.S. at 119; see *Brown*, 432 U.S. at 166 n.6. But *Jeffers* makes clear that the Double Jeopardy Clause allows a second trial for the "same offence" when that second trial is the result of the defendant's own voluntary election. The offenses in the two trials in *Jeffers* were found to be the "same" for double-jeopardy purposes, but the plurality recognized that even though "the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for 'the same offense,'" a defendant cannot object to such prosecutions "[i]f the defendant expressly asks for separate trials." 432 U.S. at 150, 152.

2. The issue-preclusion component of the Double Jeopardy Clause does not create a right distinct from the right against multiple trials for the same offense

Petitioner acknowledges (Br. 10) that this Court has "held that a defendant who requests separate trials necessarily waives the protection against multiple trials because the former and the latter are mutually exclusive." He contends (Br. 11, 15, 27), however, that the voluntary-choice doctrine does not foreclose a claim of issue preclusion, on the theory that the "issue-preclusive effect of an acquittal" is "distinct" from the "right against multiple trials." That contention is incorrect.

a. As the foregoing discussion illustrates, issue preclusion under the Double Jeopardy Clause is a strand of the Clause's protection against multiple trials for the same offense, not an independent constitutional right. See *Yeager*, 557 U.S. at 119. It defines the circumstances in which a defendant is considered to be on trial for the "same offence," *ibid.*, but does not confer any distinct extra-textual rights, see U.S. Const. Amend. V (providing that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb").

This Court's treatment of issue-preclusion claims under the Double Jeopardy Clause confirms the point. The only relief the Court has ever provided, or suggested would be appropriate, for such a claim is the prohibition of a successive trial. In *Ashe* itself, the Court held that "a second prosecution for the robbery" of a different victim was "wholly impermissible." 397 U.S. at 445; see *id.* at 446. And other decisions of this Court are to the same effect. See, *e.g.*, *Turner* v. *Arkansas*, 407 U.S. 366, 369 (1972) (per curiam) (acquittal on mur-

der charge "negate[d] the possibility of a constitutionally valid conviction" on subsequent indictment "for [a related] robbery"); *Harris* v. *Washington*, 404 U.S. 55, 55-57 (1971) (per curiam) (acquittal on murder charge with respect to one victim barred subsequent trial for murder and assault of different victims); cf. *Dixon*, 509 U.S. at 705 ("The collateral-estoppel effect attributed to the Double Jeopardy Clause * * * may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts.") (emphasis omitted); *Brown*, 432 U.S. at 166-167 n.6 (collateral-estoppel doctrine holds that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred"). Even the dissent from the denial of a petition for a writ of certiorari in *Green* v. *Ohio*, 455 U.S. 976 (1982) (White, J., dissenting), on which petitioner relies (Br. 24), states that where collateral estoppel applies, it "bar[s] a [second] trial." 455 U.S. at 981.

This Court's assertion of appellate jurisdiction over cases involving "the double jeopardy right to issue preclusion" (Pet. Br. 13) reflects its status as a component of the protection against multiple trials for the same offense. The Court has held that an order denying a defendant's double-jeopardy claim is an immediately appealable "final decision[]" under 28 U.S.C. 1291 because the Double Jeopardy Clause protects a defendant "against being twice put to trial for the same offense." *Abney* v. *United States*, 431 U.S. 651, 661 (1977) (emphasis omitted). A defendant's "double jeopardy challenge to the indictment" therefore "must be reviewable before that subsequent exposure occurs." *Id.* at 662. The Court has never suggested that claims invoking the issue-preclusion component of the Double Jeopardy

Clause are distinct from claims invoking a right to be free of multiple trials, such that they should be treated differently for purposes of appeal. To the contrary, the Court has repeatedly and recently considered pretrial appeals of such claims. See *Bravo-Fernandez*, 137 S. Ct. at 362-363; *Yeager*, 557 U.S. at 115-117.

b. Petitioner thus errs in suggesting (Br. 15-17, 27) that issue preclusion can be distinguished from the right against multiple trials on the ground that issue preclusion "does not necessarily prevent a second trial" and leaves the prosecution "free to press forward on any factual theory that the first jury did not reject."

As a general matter, when a defendant faces legally distinct charges arising out of the same set of facts, the prosecution "is entirely free to bring them separately." *Dixon*, 509 U.S. at 705. A defendant may bar a successive trial on issue-preclusion grounds only if a later prosecution would require proof of an "ultimate fact" that was necessarily within the scope of a prior acquittal. *Ashe*, 397 U.S. at 443. If such proof would not be required, then the issue-preclusion strand of double-jeopardy law does not apply at all. See *Yates* v. *United States*, 354 U.S. 298, 338 (1957) ("So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative.") (citations omitted). But when a defendant does raise a valid constitutional issue-preclusion objection, the nature of the objection is necessarily that he is being tried twice for the "same offence" such that the second trial cannot proceed. That objection is "logically inconsistent," Pet. Br. 27 (citation omitted), with a defendant's voluntary consent to severance. And, for that reason, it is the same objection

that *Jeffers* holds cannot be raised by a defendant who has agreed to successive trials.[4]

c. Petitioner's argument that the issue-preclusion component of the Double Jeopardy Clause is "distinct" from the right against multiple trials rests primarily on his assertion (Br. 15-17, 27-28) that the Clause's issue-preclusion prong functions as an exclusionary rule with respect to particular evidence, rather than a bar on a successive trial. This Court's decision in *Dowling* v. *United States*, 493 U.S. 342 (1990), forecloses that argument.

In *Dowling*, the Court rejected a bank-robbery defendant's contention that his double-jeopardy rights had been violated by the introduction of evidence, offered to bolster the identification of him as the bank robber, relating to his commission of a home invasion of which he had previously been acquitted. 493 U.S. at 344-349. Like petitioner here, the defendant in *Dowling* did not "claim * * * that the acquittal in the [home-invasion case] barred" his prosecution for bank robbery altogether; he contended instead that "by the same principle" applied in *Ashe*, the acquittal in the home-

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[4] Petitioner attempts to cast doubt on *Jeffers'* applicability to this case by noting (Br. 24) that "two of the Justices in the *Jeffers* plurality" later joined a dissent from the denial of certiorari suggesting that *Jeffers* would have come out differently had the defendant been acquitted rather than convicted in his first trial. See *Green*, 455 U.S. at 980 (White, J., dissenting). That non-precedential statement, in a case in which the arguments were not fully developed, cannot bear the weight petitioner places on it. That is particularly so because *Green* concerned the dismissal of a charge before trial on a ground unrelated to guilt or innocence, see *id.* at 977, but the dissenting statement fails to address this Court's holding in *United States* v. *Scott*, *supra*, that a defendant may be retried following the government's successful appeal of such a dismissal, see 437 U.S. at 98-99.

invasion case "precluded the Government from introducing into evidence" the testimony of the home-invasion victim. *Id.* at 347-348. The Court, however, found that "the collateral-estoppel component of the Double Jeopardy Clause [wa]s inapposite" because "the prior acquittal did not determine an ultimate issue in the [bank-robbery]" proceeding. *Id.* at 348-349. The bank-robbery jury "might reasonably conclude" that the defendant committed the home invasion, "even if it did not believe beyond a reasonable doubt that [he] committed the crimes charged at the first trial." *Ibid.* The Court "decline[d] to extend *Ashe* * * * and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances * * * relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* at 348; see *United States* v. *Felix*, 503 U.S. 378, 387 (1992) (explaining that *Dowling* "endorse[s] * * * the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct").

Dowling makes clear that prior acquitted conduct raises double-jeopardy concerns only if the acquittal "determine[s] an ultimate issue" in a successive case. 493 U.S. at 348. If it does, then the "second prosecution w[ould be] impermissible" under *Ashe*. *Ibid.* If it does not, then normal evidentiary rules govern its admission. *Ibid.* In other words, the double-jeopardy right where a defendant was acquitted on a fact necessary to a successful second prosecution would be a right not to be tried twice for the same offense—but that is the very

right a defendant does not have if he voluntarily consented to the second trial. See *Jeffers*, 432 U.S. at 150-152 (plurality opinion). And when the defendant seeks only to rely on a prior adjudication to preclude the admission of evidence in a later trial, he does not have a valid double-jeopardy claim at all.

Petitioner does not discuss *Dowling*; he identifies no decision of this Court interpreting the Double Jeopardy Clause to bar the admission of evidence; and the government is aware of none. Petitioner instead cites two lower-court decisions for the proposition that the Double Jeopardy Clause imposes its own evidentiary limitations. See Pet. Br. 16 (citing *Joya* v. *United States*, 53 A.3d 309, 323 (D.C. 2012); *Jackson* v. *State*, 183 So. 3d 1211, 1215 (Fla. Dist. Ct. App. 2016)). Neither of those cases, however, squares its analysis with *Dowling*.[5]

d. Petitioner separately cites (Br. 28) civil cases for the proposition that "mere agreement to bifurcation does not waive the right to issue preclusion." If that were true, it would be irrelevant. The governing double-jeopardy precedents do not rely on waiver, see pp. 23-24, *infra*, and in any event, given the differences between criminal and civil proceedings, this Court has cautioned that application of issue prelusion must be more "guarded" in criminal cases. *Bravo-Fernandez*, 137 S. Ct. at 358; see also, *e.g.*, *Standefer* v. *United States*, 447 U.S. 10, 21-25 (1980). Indeed, each of the decisions petitioner cites (Br. 28) rests on concerns particular to the civil context

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[5] Before this Court's decision in *Dowling*, the Supreme Court of Virginia held "that collateral estoppel is [not] limited to barring prosecutions" and could instead be used to suppress evidence. *Simon* v. *Commonwealth*, 258 S.E.2d 567, 570 (1979). The Supreme Court of Virginia has not addressed the continued vitality of that holding after *Dowling*.

in which it arose, and which do not apply here. See *Butler* v. *Pollard*, 800 F.2d 223, 224-225 (10th Cir. 1986) (affording issue-preclusive effect to jury factfinding in light of Seventh Amendment concerns); *Goldstein* v. *Cogswell*, No. 85 Civ. 9256, 1991 WL 60420, at *15 (S.D.N.Y. Apr. 11, 1991) (affording issue-preclusive effect due to concerns regarding double recovery); compare *Clements* v. *Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 330 (9th Cir. 1995) (applying issue preclusion to "conserv[e] * * * judicial resources"), with *Standefer*, 447 U.S. at 25 (holding that "competing policy considerations" in criminal case "outweigh[ed] the [judicial] economy concerns that undergird the estoppel doctrine" in civil cases).

3. Waiver doctrine does not control the double-jeopardy implications of a defendant's consent to multiple proceedings

Petitioner further errs in addressing (Br. 24) the issue in this case through the lens of traditional "[w]aiver analysis."

a. As discussed above, pp. 10-13, *supra*, the Court held in *Dinitz*, *Jeffers*, *Scott*, and *Johnson* that the Double Jeopardy Clause is not violated when a defendant faces a second trial due to his own litigation decisions. Those holdings are not grounded in findings of knowing and intelligent waiver, but instead in the principle that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99.

The defendant in *Dinitz*, for example, contended that his mistrial motion was not inconsistent with his later assertion of a double-jeopardy claim because it was not a "knowing, intelligent, and voluntary" waiver of his double-jeopardy rights. 424 U.S. at 609 n.11. The

Court rejected that contention, *ibid.*, explaining that "traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error," *id.* at 609. It accordingly held not that the defendant had waived a double-jeopardy right, but that the court of appeals had "erred in finding that the retrial" following the defendant's mistrial motion "violated [his] constitutional right not to be twice put in jeopardy." *Id.* at 611-612; see *Scott*, 437 U.S. at 99 (explaining that in concluding the defendant there "suffer[ed] no injury cognizable under the Double Jeopardy Clause," the Court did not "thereby adopt the doctrine of 'waiver' of double jeopardy").

Although the Court has sometimes "refused to infer waiver" (Pet. Br. 29) in the double-jeopardy context when the government's argument was framed in those terms, the cases petitioner cites are ones in which the defendants did not "elect[] to have [multiple] offenses tried separately," *Jeffers*, 432 U.S. at 152—that is, they failed to take any action that envisioned multiple prosecutions. In *Sanabria* v. *United States*, 437 U.S. 54 (1978), the Court reasoned that a defendant's request for an evidentiary ruling that the district court erroneously granted was not an action that "contemplated a second trial" on the single offense with which he had been charged. *Id.* at 75; see *id.* at 76-77. And in *Green* v. *United States*, 355 U.S. 184 (1957), the Court held that a defendant charged with first- and second-degree murder who was convicted of the lesser charge at an initial trial could not be deemed to have acquiesced in a retrial on the greater charge by appealing his conviction. See *id.* at 185-186, 190-191.

b. Even if waiver doctrine provided the right framework for the question presented here, it would not suggest that a defendant who consents to two trials involving the same set of facts may invoke the issue-preclusion component of the Double Jeopardy Clause to bar or limit the second trial.

A defendant who consents to multiple trials on different charges arising from the same set of facts, and is then subject to multiple trials on different charges arising from the same set of facts, receives precisely what he consented to. He cannot reasonably have been unaware that the evidence at the second trial would overlap with the evidence at the first. Nor could he reasonably have been unaware of the possibility that he would be found guilty in one trial but not the other—indeed, severance is generally predicated on a desire to ensure distinct consideration of multiple charges, see, *e.g.*, Fed. R. Crim. P. 14(a).

A defendant who elects two trials on the same set of facts has no legal right to object to the second trial on the ground that it might result in an inconsistent verdict from the first. Had the defendant proceeded with a single trial on multiple charges, he could not invoke the Double Jeopardy Clause to object to inconsistent verdicts. See *United States* v. *Powell*, 469 U.S. 57, 64-65 (1984). A defendant's intentional pursuit of two trials to maximize his chances of prevailing in at least one should not give him the additional benefit of automatically prevailing in both if the first one goes his way.

C. Petitioner's Double-Jeopardy Claim Is Foreclosed By His Consent To Severance Of The Charges

These principles make clear that petitioner cannot rely on the Double Jeopardy Clause to bar the second trial to which he consented. Petitioner had every reason

to expect that his second trial would involve similar testimony and evidence as the first. He was charged with breaking and entering, larceny, and unlawful possession of firearms following a felony conviction based on events alleged to have taken place in a single day. Thus, when he agreed, for his own benefit, to sever the trials—thereby excluding from the first trial evidence of his prior felony convictions—he necessarily agreed to a full second proceeding on the felon-in-possession charge that might include testimony and evidence about his presence at the Garrisons' home.

Petitioner contends (Br. 28) that even if his consent to severance would otherwise foreclose his constitutional issue-preclusion claim, "equitable considerations" specific to his case dictate a different result. In particular, petitioner maintains (Br. 29-31) that he had "no meaningful choice" but to consent to severance in order to avoid "undue prejudice" from the first jury learning of his prior felony convictions. The Court rejected a similar argument in *Dinitz*. In that case, the defendant argued that he "face[d] a 'Hobson's choice'" after the trial judge excluded his lead counsel from the courtroom: if he did not seek a mistrial, he would be forced to undergo "a trial tainted by prejudic[e]" not of his own creation. *Dinitz*, 424 U.S. at 609. This Court held, however, that so long as the defendant himself elects the route that leads to a second trial, his double-jeopardy rights have not been infringed. See *id.* at 611-612.

"The criminal process * * * is replete with situations requiring 'the making of difficult judgments' as to which course to follow," and "the Constitution does not * * * forbid requiring [a defendant] to choose." *McGautha* v. *California*, 402 U.S. 183, 213 (1971) (quoting *McMann*

v. *Richardson*, 397 U.S. 759, 769 (1970)), vacated judgment on other grounds in No. 204 *sub nom. Crampton* v. *Ohio*, 408 U.S. 941 (1972). As the Court has explained, "[a] hard choice is not the same as no choice." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 315 (2000); see also, *e.g.*, *Ohler* v. *United States*, 529 U.S. 753, 754-760 (2000) (defendant who preemptively introduces evidence of prior conviction on direct examination may not claim on appeal that admission of evidence was error); *Texas* v. *McCullough*, 475 U.S. 134, 135-144 (1986) (defendant who successfully appeals from his first conviction may receive a greater sentence following retrial so long as the increase is not based on vindictiveness); *South Dakota* v. *Neville*, 459 U.S. 553, 563-564 (1983) (upholding a state law requiring a suspect to submit to a blood-alcohol test or have his refusal used against him); *Brown* v. *United States*, 356 U.S. 148, 154-157 (1958) (defendant who takes the stand in his own defense cannot claim the privilege against self-incrimination during cross-examination); cf. *Richardson*, 397 U.S. at 769 (noting that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments").

In any event, petitioner faced no unsolvable dilemma here. Although asserting his right to a single trial on all of the charged offenses would have necessitated informing the jury of at least some aspect of his criminal record, the decision was no more difficult than, for example, a defendant's decision whether to assert his right to testify in his own defense and allow the admission of past crimes as impeachment evidence, or, if he does testify, whether to introduce his criminal record on direct examination in order to blunt its effect. See *Ohler*, 529 U.S. at 754-760. Virginia case law allows a defendant to request

severance of a felon-in-possession charge in a case like this, see *Hackney* v. *Commonwealth*, 504 S.E.2d 385, 388-389 (Va. Ct. App. 1998) (en banc), but Virginia cases have not treated that right as constitutionally compelled, and petitioner identifies no decision holding that it is, see *Commonwealth* v. *Smith*, 556 S.E.2d 223, 225-227 & n.2 (Va. 2002); *Purvis* v. *Commonwealth*, 522 S.E.2d 898, 902 (Va. Ct. App. 2000).

Numerous jurisdictions do not view severance as necessary when a defendant faces a felon-in-possession charge in combination with other charges that do not have a prior conviction as an element. See, *e.g.*, *State* v. *Taylor*, 729 A.2d 226, 227-229 (Conn. App. Ct. 1999); *Goodall* v. *United States*, 686 A.2d 178, 181-184 (D.C. 1996); *Frazier* v. *State*, 569 A.2d 684, 687-691 (Md. 1990); *People* v. *Turner*, No. 241591, 2003 WL 22849822, at *1 (Mich. Ct. App. Dec. 2, 2003) (per curiam); *State* v. *Evans*, 456 N.W.2d 739, 744-747 (Neb. 1990) (per curiam). Federal courts, for example, have identified "several safeguards short of severance that a district court may employ to avoid 'undue prejudice,' including a stipulation as to the existence of the prior felony conviction, a bench trial on the [felon-in-possession] charge, or a cautionary jury instruction." *United States* v. *Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997) (citation omitted). The stipulation option reflects this Court's holding in *Old Chief* v. *United States*, 519 U.S. 172 (1997), that a defendant facing felon-in-possession and other charges was entitled under Federal Rule of Evidence 403 to seek exclusion of the record of a prior conviction if he stipulated to the existence of the prior felony conviction. See 519 U.S. at 190-192.

The trial court might have allowed a similar procedure in petitioner's case. See *Boone* v. *Commonwealth*,

740 S.E.2d 11, 14 & n.* (Va. 2013) (leaving open whether to follow *Old Chief* as a matter of Virginia law). But petitioner did not request it, or any other potential safeguard against any prejudicial effect of his prior convictions. He instead selected a course—severance—that expressly contemplated two trials. That he did so because he believed it would increase his chances of acquittal on at least one of the charges "does not relieve [him of] the consequences of his voluntary choice," *Scott*, 437 U.S. at 99—namely, two trials.

CONCLUSION

The decision of the Supreme Court of Virginia should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

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QUESTION PRESENTED

Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. Toward that end, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and submits *amicus* briefs to this Court and other courts across the Nation. Cato regularly advocates for a robust interpretation of the Fifth Amendment's Double Jeopardy Clause, as envisioned by the Framers in the Constitution, as an important check on prosecutorial excesses and a vital bulwark for liberty. It has submitted *amicus* briefs to this Court in a number of relevant cases, including *Hatch v. United States*, No. 13-6765, *Cannon v. United States*, No. 14-5356, and *Bravo-Fernandez v. United States*, No. 15-537.

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus curiae* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of *amicus curiae* briefs and copies of their blanket letters of consent have been lodged with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution guarantees that no person shall be "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. This "great constitutional protection[]" is a "vital safeguard in our society." *Green v. United States*, 355 U.S. 184, 198 (1957). "[E]mbodied" in this right is the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, it "cannot again be litigated" in a second trial for a separate offense. *Ashe v. Swenson*, 397 U.S. 436, 443, 445 (1970).

Petitioner here, like more and more criminal defendants in recent years, was charged with multiple, overlapping offenses: (1) breaking and entering, (2) grand larceny, and (3) possession of a firearm as a convicted felon. Pet. App. 4a. This charging decision turned on a highly aggressive application of Virginia's felon-in-possession statute. By the Commonwealth's own account, the alleged firearm violation here was fleeting happenstance: Petitioner supposedly "handled" the victim's firearms by moving them out of the way in order to commit the different offense of stealing money from a safe. Br. in Opp. 11; *see id.* at 4. That is, the Commonwealth brought the felon-in-possession count because its factual theory of grand larceny required Petitioner to "temporarily possess[]" firearms that happened to be stored in the safe. *Id.* at 11.

The Commonwealth recognized that state law protected Petitioner from the prejudice that would result if his trial on the two primary counts included proof he was a convicted felon. It therefore moved to sever the felon-in-possession count and also opted to try the primary offenses first. J.A. 47–48. The jury acquitted Petitioner of the breaking and entering and

grand larceny charges. Pet. App. 4a. Given how those charges were tried, the jury necessarily concluded that Petitioner was not guilty of participating in the underlying burglary and theft. J.A. 101. Undeterred, the Commonwealth pressed forward on the felon-in-possession count, refining its case to present the same underlying factual theory to a second jury—even though "the Double Jeopardy Clause precludes the [g]overnment from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009). Glossing over the fact that it had moved to sever the charges in accordance with state law, the Commonwealth now argues that Petitioner "waived his double-jeopardy rights" simply by "agreeing" to severance. Br. in Opp. 25–26.

The Commonwealth's "narrow, grudging application" of the Double Jeopardy Clause would "deprive [it] of much of [its] significance" and should be rejected. *Green*, 355 U.S. at 198. The Commonwealth's position is inconsistent with the historical development of double jeopardy jurisprudence in the United States—in particular, its goal of guarding against the structural power imbalances that exist between prosecutors and defendants. *See infra* Pt. I. It is also impossible to square the Commonwealth's position with the sanctity of jury acquittals and the time-honored authority and prerogative of the jury—speaking for the community—to ultimately and finally determine facts. *See infra* Pt. II.

This Court has emphasized that a jury's verdict must not be "impugn[ed]" even if "logically inconsistent." *Yeager*, 557 U.S. at 125. This case is easier: the first jury rendered a wholly *consistent* verdict, acquitting Petitioner on both primary counts. Thus, the

question before the Court "is simply whether, after a jury determined by its verdict that the petitioner was not one of the [perpetrators], the [Commonwealth] could constitutionally hale him before a new jury to litigate that issue again." *Ashe*, 397 U.S. at 446.

If the Commonwealth's position becomes the law of the land, the government will be further incentivized to charge more offenses based on the same underlying conduct, thus increasing the need for (and likelihood of) multiple trials for the same underlying series of events. This type of overreach will allow the government to run dress rehearsals for successive prosecutions in more and more cases, thereby undermining the salutary—indeed, "sacred," *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1873)—liberty interests protected by the Double Jeopardy Clause, and diminishing the "overriding responsibility" of the jury "to stand between the accused and a potentially arbitrary or abusive [g]overnment." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). This result would be a travesty; in today's world of ever-expanding criminal codes and regulatory regimes, the government needs fewer, not greater, incentives for piling on theories of criminal liability.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PROTECTS DEFENDANTS AGAINST THE STRUCTURAL POWER IMBALANCE BETWEEN THEMSELVES AND THE GOVERNMENT.

1. The double jeopardy bar serves as one of our criminal justice system's most important structural protections against the ill-effects of the imbalance of power between the government and the accused—a

danger driven by deep, systemic factors, notwithstanding the good intentions of individual prosecutors. The preclusive effect of an acquittal therefore should not turn on whether multiple trials resulted from prosecutorial misconduct or strategic gamesmanship in the case at hand. In arguing otherwise, the Commonwealth fundamentally misconstrues the history, purpose, and development of double jeopardy safeguards.

2. "The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence." *Benton v. Maryland*, 395 U.S. 784, 795 (1969). "[T]he ancient common law . . . provided that one acquittal or conviction should satisfy the law," in light of the historical reality that "state trials have been employed as a formidable engine in the hands of a dominant administration." *Lange*, 85 U.S. at 171 (citations omitted). The Founders placed the "double jeopardy guarantee" into the United States Constitution to "embody the protection of the common-law pleas." *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

The original "purpose of the double jeopardy rule was to protect against abusive prosecutorial behavior." John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 444 (2009). When a jury acquits, the double jeopardy bar accomplishes this goal not through a case-specific inquiry into the actions of individual prosecutors, but rather with "the brightest of the bright-line rules": "whenever, and by whatever means, there is an acquittal in a criminal prosecution,

the scene is closed and the curtain drops." Lissa Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases*, 63 SMU L. Rev. 1033, 1043 n.104 (2010) (citation omitted).

As this Court explained sixty years ago (and has repeated in numerous double jeopardy opinions since):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187–88.

3. The issue-preclusion component of the Double Jeopardy Clause plays a central role in preserving this structural protection. By prohibiting the prosecution from relitigating factual allegations a prior jury has already rejected, the government is prevented from "gain[ing] an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980). Indeed, the prosecution's ability to "treat[] the first trial as no more than a dry run for the second prosecution" is "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447.

The Double Jeopardy Clause thus precludes the prosecution from relitigating any issue of fact that

was necessarily decided against the government through a jury acquittal, whether or not the prosecutor committed misconduct. *See Harris v. Washington*, 404 U.S. 55, 56–57 (1971) (per curiam) (first jury's verdict entitled to issue-preclusive effect "irrespective of whether the [first] jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions"). The prosecution is simply prohibited from taking any proverbial second bites. "For whatever else [the] constitutional guarantee [against double jeopardy] may embrace . . . it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe*, 397 U.S. at 445–46. In this situation, no inquiry into the propriety of the prosecutor's actions is either necessary or appropriate.

Indeed, when the Court has spoken of government overreach in issue-preclusion cases, it has focused on structural concerns as opposed to case-specific instances of prosecutorial misconduct. In *Yeager*, the Court held that an "apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts" does not "affect[] the preclusive force of the acquittals under the Double Jeopardy Clause." 557 U.S. at 112. The Court noted that the Clause serves as a structural barrier between the substantial power of the government's Goliath and the Davidian defendant. *See id.* at 117–18. The Court rejected the dissent's view that the Clause and its issue-preclusion component are inoperative "'where the State has made no effort to prosecute the charges seriatim,'" *id.* at 131 (Scalia, J., dissenting) (quoting *Ohio v. Johnson*, 467 U.S. 493, 500 n.9

(1984)), language the Commonwealth relies on here as well, Br. in Opp. 17 & n.72.[2]

The structural role of the Double Jeopardy Clause in safeguarding the accused—as opposed to policing case-specific prosecutorial misconduct—was also the animating force in *Ashe*. There, the State tried the accused in connection with the robbery of participants in a poker game. 397 U.S. at 437–38. The jury acquitted him of robbing one of the victims, and the only rationale for that finding was that he was not present at the scene and could not have been one of the robbers. *Id.* at 446. The State was therefore precluded from trying him for robbing another victim, as doing so would require a second jury to contradict the first jury's factual findings. *Id.* This Court did not tie the outcome in *Ashe* to prosecutorial bad faith; in fact, it identified no misconduct at all by the State. *See, e.g.*, *id.* at 447 (crediting the State's position that the prosecutor "did what every good attorney would do" in "refin[ing] his presentation" for the second trial). But the

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[2] The Commonwealth misses the mark when it invokes this dictum from *Johnson* to argue that issue-preclusion turns on whether the prosecutor wanted separate trials. In *Johnson*, the Court declined to apply the Double Jeopardy Clause to bar prosecution for murder and aggravated robbery when the defendant, over the State's objection, pleaded guilty to the lesser charged crimes of involuntary manslaughter and grand theft. 467 U.S. at 495–96. The Court's comment about the State not seeking to prosecute "seriatim," *id.* at 500 n.9, was not the basis for the holding. Rather, the double jeopardy bar did not apply because there simply was no "double" jeopardy: Two of the four charged crimes had been resolved through guilty pleas, with the other two to be tried in the same proceeding. *Id.* at 501–02. This plea-trial distinction likewise rendered the issue-preclusion component of the Double Jeopardy Clause inapplicable. *See id.* at 500 n.9. Indeed, without an earlier trial, there could have been no acquittal. *See id.* at 501–02.

Court nevertheless held that giving the State another opportunity to prove the same underlying facts in a subsequent trial "is precisely what the constitutional guarantee forbids." *Id.*

4. As this Court has recognized time and again, prosecutors already have substantial power in the criminal justice system—including the unfettered authority to pursue multiple overlapping charges that increase their chances of obtaining a conviction. *See Ashe*, 397 U.S. at 446; *see also Yeager*, 557 U.S. at 113 (defendant charged with 126 counts in a securities fraud case); *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting) ("[W]here the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict."). The double jeopardy bar is an essential, structural limitation on that power.

5. The era of overcriminalization in which we live highlights the importance of the Double Jeopardy Clause's structural safeguard against repeated prosecution for the same underlying conduct. The United States Code contains 27,000 pages of federal crimes. Michael Pierce, *The Court and Overcriminalization*, 68 Stan. L. Rev. Online 50, 59 (2015). The estimated number of federal crimes is somewhere between 3,000 and 4,500.[3] Indeed, there are "at least 100 federal

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[3] *See* Glenn Harlan Reynolds, *Reynolds: You Are Probably Breaking the Law Right Now*, USA Today (Mar. 29, 2015), https://www.usatoday.com/story/opinion/2015/03/29/crime-law-criminal-unfair-column/70630978; Edwin Meese III, *Too Many Laws Turn Innocents into Criminals*, Heritage Foundation (May 26, 2010), http://www.heritage.org/crime-and-justice/commentary/too-many-laws-turn-innocents-criminals.

false statement statutes" alone. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 566 n.107 (2012) (citation omitted) (noting that approximately fifty-four do not even "contain an express materiality requirement"). Even more incredibly, some 300,000 regulations can form the basis for a criminal prosecution.[4] And many of these regulatory crimes do not even require proof of mens rea. Reynolds, *supra* note 3. It is no longer far-fetched to posit, as one scholar does, that "'[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime.'"[5]

This Court has seen first-hand the effects of this overcriminalization. From using the document destruction prohibitions of the Sarbanes-Oxley Act against a fisherman who released his catch, to charging a vengeful spouse under the Chemical Weapons Treaty, federal prosecutions alone have expanded to more and more conduct. *See Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014). The existence of numerous overlapping crimes gives prosecutors the freedom "to

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[4] John-Michael Seibler, *The Trump Administration Should Crack Down on Silly Rules That Carry Criminal Penalties*, Daily Signal (Dec. 2, 2016), http://dailysignal.com/2016/12/02/the-trump-administration-should-crack-down-on-silly-rules-that-carry-criminal-penalties.

[5] Timothy Head & Matt Kibbe, *Too Many Laws Means Too Many Criminals*, National Review (May 21, 2015), http://www.nationalreview.com/article/418689/too-many-laws-means-too-many-criminals-timothy-head-matt-kibbe (quoting Professor John Baker). A civil rights expert has further suggested "that the average American commits three felonies a day, and they are often not even aware they are breaking the law." *Id.* (linking to article by Harvey Silverglate).

pick and choose among the applicable statutes as they see fit." Smith, *supra*, at 554–55.

Under the Commonwealth's proposed rule—*i.e.*, a defendant's issue-preclusion objections are waived prospectively just because he assents to separate trials—prosecutors would be structurally incentivized to charge multiple overlapping crimes and then rely on severance to secure the very "dry run" that this Court has prohibited. *Ashe*, 397 U.S. at 447 (1970). Properly applied, the issue-preclusion component of the double jeopardy bar plays a vital role in reining in these structural enticements to prosecutorial overreach. *See* Griffin, *supra*, at 1043 n.104. That was precisely this Court's point more than forty-five years ago in *Ashe* when, after noting "the extraordinary proliferation of overlapping and related statutory offenses" and the resultant greater "potential for unfair and abusive reprosecutions," it recognized the "need to prevent such abuses through the doctrine of collateral estoppel." *Ashe*, 397 U.S. at 445 n.10.

6. The Commonwealth fundamentally misunderstands the type of "prosecutorial overreach" that the Double Jeopardy Clause is meant to prevent. *See* Br. in Opp. 13–17. From the Clause's common law origins to the present, it has served as a critical tool to forestall prosecutorial mischief and the expansion of unchecked State powers at a *systemic* level—the good intentions of a given prosecutor in a particular case notwithstanding. It incentivizes prosecutors to try their full and best case the first time because they may not wear down the accused through successive prosecutions. *See Green*, 355 U.S. at 187–88.

In suggesting that Petitioner's consent to severance abrogated double jeopardy protections that would otherwise be afforded him, the Commonwealth

misapprehends the evil that issue preclusion wards off. Even when prosecutors are not engaging in misconduct, and even where severance is the appropriate way to avoid prejudicing a defendant, the government cannot be permitted to force an accused to defend against the allegations that a jury already rejected in a prior trial. A contrary holding would permit the government to conduct the very type of do-over that the Double Jeopardy Clause was meant to thwart.

II. THE COMMONWEALTH'S POSITION NEGATES THE COMMUNITY'S PREROGATIVE TO DETERMINE FACTS THROUGH TRIAL BY JURY AND IMPUGNS THE INVIOLATE NATURE OF JURY ACQUITTALS.

1. The Commonwealth's narrow focus on Petitioner's interests, including its argument that Petitioner has effectively waived all double jeopardy rights by consenting to two trials, also ignores the separate but related constitutional interests that the *community* has in preserving its vital role in the administration of criminal justice. If the Court permits prosecutors to try defendants a second time on the exact same factual theories that a first jury conclusively rejected, it will upend the Constitution's careful allocation of power and enable the government to override the otherwise unassailable judgment of the community—embodied here in the jury's unambiguous decision to acquit Petitioner on both counts in his first trial.

2. The prohibition against double jeopardy and the right to a jury trial developed in parallel under the common law as mutually reinforcing protections against the pernicious threat of arbitrary rule. As noted above, the original "purpose of the double jeopardy rule was to protect against abusive prosecutorial behavior." Langbein, *supra*, at 444. Similarly, the

right to a jury trial developed as a necessary "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968) (right to trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties").

Indeed, these protections were often conceived as concomitant. At common law, the "protection against double jeopardy historically applied only to charges on which a jury had rendered a verdict." *Smith v. Massachusetts*, 543 U.S. 462, 466 (2005). In the colonies, "the only state constitutional precursor" of the United States Constitution's "double-jeopardy clause conjoined this provision to its criminal jury-trial guarantee." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 97 (1998) (citing N.H. Const. of 1784 pt. I, art. I, § XVI). And "the Maryland state ratifying convention—one of only two that raised the double-jeopardy issue—made this linkage even more explicit," providing that "there shall be a trial by jury in all criminal cases" and "no appeal from matter of fact, or second trial after acquittal." *Id.* (citations and internal quotation marks omitted).

3. The community's central role in the administration of criminal justice has been evident since our country's founding. As Alexander Hamilton observed, "friends and adversaries of the plan of the convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in

this: the former regard[ed] it as a valuable safeguard to liberty, the latter represent[ed] it as the very palladium of free government." The Federalist No. 83 (Alexander Hamilton). This "insistence upon community participation in the determination of guilt or innocence" directly addresses the Founders' "[f]ear of unchecked power." *Duncan*, 391 U.S. at 156.

Thus, the Declaration of Independence included among its "solemn objections" to the King his "'depriving us in many cases, of the benefits of Trial by Jury,' and his 'transporting us beyond Seas to be tried for pretended offenses.'" *Duncan*, 391 U.S. at 152 (citation omitted). Against the backdrop of those protestations, the Constitution was drafted to command that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed," U.S. Const. art. III, § 2; that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," U.S. Const. amend. VI; and that no person shall be "twice put in jeopardy of life or limb," U.S. Const. amend. V. Together, these guarantees reflect "a profound judgment about the way in which law should be enforced and justice administered," *Duncan*, 391 U.S. at 155, namely, with the direct participation of the community.

In particular, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also, e.g.*, Letter XV by the Federal Farmer

(Jan. 18, 1788), *reprinted in* 2 The Complete Anti-Federalist 315, 320 (Herbert J. Storing ed. 1981) (the jury "secures to the people at large, their just and rightful control in the judicial department"); Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), *reprinted in* 15 Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed. 1958). By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991), and "'places the real direction of society into the hands of the governed,'" Amar, *supra*, at 88 (quoting Alexis De Tocqueville, *Democracy in America* 293–94 (Phillips Bradley ed. 1945)).

"[T]hough small in its empire of a single verdict," the jury "serves a critical democratic function—grounding the law in the living world of the citizens whose obedience it commands." Jenny Carroll, *The Jury as Democracy*, 66 Ala. L. Rev. 825, 830 (2015); *see also* H.R. Rep. No. 90-1076, at 1797 (1968) ("[T]he jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it."). The jury is tasked with making "difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into a legal system." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (citation, alteration, and internal quotation marks omitted). The jury's role in the criminal justice system ensures the fair administration of justice and, with it, the "continued acceptance of the laws by . . . the people." *Powers*, 499 U.S. at 407.

The constitutionally prescribed composition of the jury—ordinary citizens drawn "from a representative cross section of the community," *Taylor v. Louisiana*,

419 U.S. 522, 528 (1975)—also reflects a determination (borne out by empirical studies) that a group of individuals "can draw wiser and safer conclusions from admitted facts . . . than can a single judge." *R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873); *see also* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 242 (2009) ("The diversity, group dynamics, and neutrality of juries offer benefits in fact-finding over that of a single judge."). Indeed, "when juries differ with the result at which [a] judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan*, 391 U.S. at 157.

4. By virtue of the intersection of the Double Jeopardy Clause and the jury trial right, the double jeopardy bar is more than just a shield for the defendant alone; rather, it is also a vehicle for the furtherance of the community's prerogatives in the criminal justice system. The community has a strong interest, complementary to but separate from that of the individual defendant's, in seeing that its verdicts—rendered through a jury process that "the Constitution regards as most likely to produce a fair result," *Singer v. United States*, 380 U.S. 24, 36 (1965)—are given great deference. And nowhere is that more true than in the context of a jury acquittal, which the Constitution regards as inviolate. *See Burks v. United States*, 437 U.S. 1, 16 (1978); *see also, e.g.*, *Yeager*, 557 U.S. at 123 (extolling "unassailable" "finality" of jury acquittal);

Green, 355 U.S. at 188 ("[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final.").[6]

The "special weight" afforded to jury acquittals, *DiFrancesco*, 449 U.S. at 129, provides a critical check against the legislative branch's broad power to enact expansive and overlapping criminal statutes, and the executive branch's virtually unfettered discretion in selecting which of those offenses to charge. *See Martin Linen*, 430 U.S. at 572–73. The Double Jeopardy Clause, moreover, sustains the Constitution's careful allocation of powers by safeguarding "the jury's sovereign space." *Yeager*, 557 U.S. at 122. "The Double Jeopardy Clause thus allows the jury to exercise its constitutional function as the conscience of the community in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments." Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 130 (1978). The Commonwealth's insistence that a defendant waives the issue-preclusive effect otherwise afforded to jury ac-

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[6] This "'absolute finality'" of "'a jury's verdict of acquittal'" under the Double Jeopardy Clause, *DiFrancesco*, 449 U.S. at 130 (emphasis omitted) (quoting *Burks*, 437 U.S. at 16), is a complete answer to the Commonwealth's reliance on situations in which non-acquittals such as hung juries, mistrials, and overturned convictions are denied preclusive effect, *see* Br. in Opp. 14, 17–18. Moreover, while acquittals by judges are also afforded preclusive effect, they do not possess the absolute finality of a jury acquittal. *Cf. Smith*, 543 U.S. at 467 ("When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty.").

quittals by consenting to severance of the charges ignores the community's fundamental interest in seeing that "'the collective judgment of the community,'" expressed through the jury as the finder of fact, is treated with "'needed finality.'" *Yeager*, 557 U.S. at 124 (quoting *United States v. Powell*, 469 U.S. 57, 67 (1984)).

5. Although the jury trial is the very bedrock on which our criminal justice system is founded, the role of the jury is dwindling to the point of a practical nullity. Recent developments—most notably, the proliferation of plea bargains—have reduced the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance"). That is cause for great caution: as the Framers understood, "the jury right [may] be lost not only by gross denial, but by erosion." *Jones*, 526 U.S. at 248. That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, Litigation, Spring 2017, at 25, 25 ("[J]uries today decide only 1–4 percent of criminal cases filed in federal and state court.").

There is no panacea for the jury's dissipating function in our criminal justice system; it is a structural problem that far exceeds the bounds of any one case or doctrine. But to avoid making the problem worse, the Court should resist the Commonwealth's proposed diminishment of the Double Jeopardy Clause and the

protection it supplies against encroachment on "the jury's sovereign space." *Yeager*, 557 U.S. at 122. The Commonwealth's attempt to chip away further at the role of the jury—in this case, by abrogating the jury's power to render an unassailable verdict of acquittal—should be rejected. It is contrary to this Court's jurisprudence and inimical to the community's vital role in safeguarding our liberty through its ongoing participation in the administration of criminal justice.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL NELSON CURRIER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF INDIANA, ALABAMA, ARKANSAS, COLORADO, KANSAS, LOUISIANA, MAINE, MICHIGAN, MONTANA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arkansas, Colorado, Kansas, Louisiana, Maine, Michigan, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of the respondent.

Currier claims that the issue-preclusion component of the Double Jeopardy Clause, *see Ashe v. Swenson*, 397 U.S. 436, 443–47 (1970), barred his trial on the felon-in-possession charge. In his view, the jury that acquitted him on the burglary and grand larceny charges necessarily found that he had not possessed the firearms, so a second jury could not find otherwise. Even assuming that factual premise, Currier created this scenario by consenting to severance of the felon-in-possession charge. Had the charges been tried together, no double jeopardy problem would have arisen had the jury acquitted on the burglary and grand larceny charges yet convicted on the firearm charge. *See United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932). It was only with Currier's consent—and for his benefit—that the court severed the charges, and defendants cannot cry double jeopardy when their own decisions created the issue. *See, e.g., Jeffers v. United States*, 432 U.S. 137, 152 (1977) (plurality opinion); *Lee v. United States*, 432 U.S. 23, 33–34

(1977); *United States v. Dinitz*, 424 U.S. 600, 607–12 (1976); *United States v. Jorn*, 400 U.S. 470, 484–85 (1971) (plurality opinion).

The *amici* States have an interest in maintaining state procedural and evidentiary rules that prevent any unfair prejudice from introduction of a defendant's prior convictions but still ensure prosecutors have a fair opportunity to press all charges arising from a single incident or transaction.

SUMMARY OF THE ARGUMENT

I. Numerous crimes require proof of the accused's criminal status, and joinder rules often force prosecutors to charge those crimes in conjunction with others that do not require such proof. Yet, as the rules of evidence reflect, it can be unfairly prejudicial for a jury to hear about a defendant's criminal history. Accordingly, criminal courts in many States will, through one procedural means or another, conduct separate trials so that proof of a defendant's criminal past does not taint the evidence with respect to a charge where it is not relevant.

Courts in some States, like Virginia, require such severance when the defendant requests it, in which case the charges are tried before different fact finders. Courts in other States require bifurcation, where the same jury hears all charges, but decides the charges unrelated to past criminal status before hearing evidence of that status.

A decision in Currier's favor would undermine these common efforts to safeguard defendants from unfair prejudice. Consider: if prosecutors must try all crimes arising out of a single incident at once to avoid the risk of being precluded from trying the status crimes at all, practices like severance and bifurcation will simply disappear.

II. The Court should reject the view, supported by the National Association of Criminal Defense Lawyers, that Currier is being forced into a "Hobson's choice" between his constitutional protection against double jeopardy and his constitutional right to a fair trial. The premise of that argument is that the Due Process Clause forbids trying an offense requiring proof of a prior conviction with other offenses, or that it prohibits the admission of evidence of the defendant's prior crimes. That premise is incorrect under the Court's precedents.

In *Spencer v. Texas*, 385 U.S. 554 (1967), the Court rejected a constitutional challenge to a Texas procedure where guilt on the underlying crime and a recidivist sentencing enhancement were considered by the same jury in a unitary proceeding. The Court held that placing the defendant's prior convictions before the jury did not violate the Fourteenth Amendment because they were relevant to the sentencing enhancement and were accompanied by an instruction limiting how the jury could use the information. It was irrelevant from a constitutional

perspective that other methods may have been deemed "fairer or wiser," as the Court does not sit as a rule-making committee for state criminal-justice systems. *Id.* at 564. The Court expressly reaffirmed *Spencer* in *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983), where it concluded that limiting instructions are effective and that no categorical common-law rule excluded evidence of prior crimes.

Nor is NACDL's argument supported by authority or practice in lower courts. While eighteen states require or prefer severance or bifurcation, most of the remaining states and the majority of federal courts do not require such measures. Instead, these courts rely on the trial judge's discretion along with curative measures, such as sanitization, stipulation, and limiting instructions. This common evidentiary practice carried on by the majority of state and federal courts does not violate the Due Process Clause.

ARGUMENT

I. A Ruling for Currier Would Discourage States from Safeguarding Defendants from Prejudicial Proof of Criminal Status

Currier's issue-preclusion claim arose because Virginia courts require that a charge of felon in possession of a firearm be severed from other charges, unless the accused and the Commonwealth agree to a joint trial. *See Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) (en banc). That

requirement is an exception to Virginia's general rule permitting joinder of offenses "based on the same act or transaction." Va. Sup. Ct. R. 3A:6(b). It is intended to minimize the impact of the defendant's status as a felon—an essential element of the firearm charge—on the factfinder's consideration of other charges for which that status is irrelevant. *See Hackney*, 504 S.E.2d at 388–89. Similar situations arise frequently across the country.

A. Charges requiring proof of the accused's convicted-offender status are frequently joined with other charges

Many offenses require proof of a defendant's felon or other convicted-offender status, and many States allow prosecutors to charge all offenses—including status crimes and aggravators—arising from the same incident together. Accordingly, the Court's decision here has the potential to affect a large number of cases.

1. Every State bars at least some felons from possessing firearms, and nearly every State's courts have held that a prior conviction for a disqualifying felony is an essential element of the crime. *See, e.g.*, *Russell v. State*, 997 N.E.2d 351, 354 & n.1 (Ind. 2013) (prohibiting serious violent felons from possessing firearms); *cf.* 18 U.S.C. § 922(g)(1); *Old Chief v. United States*, 519 U.S. 172, 185–86 (1997). An Appendix to this brief lists state statutes prohibiting persons previously convicted of various offenses from

possessing firearms, along with related state cases identifying proof of a prior conviction as an element of the offense.

Many other criminal laws also require the prosecution to prove that the defendant has a particular criminal status. Although most are aggravated versions of lower-level offenses, state courts often hold that proof of the defendant's criminal status is an element of the aggravated offense that must be submitted to a jury and proved beyond a reasonable doubt. *See, e.g.*, *State v. Allen*, 506 N.E.2d 199, 200–01 (Ohio 1987) (holding that where a prior conviction increases the degree of the offense it is an element of the aggravated offense).

For example, proof of a prior DUI conviction is an element of an aggravated DUI offense in many States. *See, e.g.*, *State ex rel. Romley v. Galati*, 985 P.2d 494, 496–97 (Ariz. 1999); *Ex Parte Benson*, 459 S.W.3d 67, 74–75 (Tex. Crim. App. 2015); *State v. Alexander*, 571 N.W.2d 662, 664 (Wis. 1997); *see also State v. Murray*, 169 P.3d 955, 968–69 (Haw. 2007) (discussing cases from other states); *cf. State v. Mburu*, 346 P.3d 1086, 1090 (Kan. Ct. App. 2015) (observing that proof of a prior DUI conviction is an element for the offense of refusing to submit to alcohol or drug testing).

Similarly, a few States require proof of a prior drug-related conviction to convict a defendant of an aggravated drug-trafficking charge. *See, e.g.*, *State v. Fox*, 105 A.3d 1029, 1032 (Me. 2014); *State v. Riley*,

649 N.E.2d 914, 916–17 (Ohio Ct. App. 1994). Use of aggravators to escalate the severity of a criminal charge is driven by anti-recidivism policies aimed at decreasing the recurrence of particularly destructive misconduct. *Cf. Missouri v. McNeely*, 569 U.S. 141, 160 (2013) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." (citation omitted)); *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring in part and concurring in the judgment) ("The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our yo[illegible] cause greater concern than the escalating use [illegible] controlled substances.").

Aggravated offenses against the person also often require proof of a prior similar conviction, on the basis that assailants have a tendency to escalate their violent acts. So, for example, many States require proof of a prior domestic violence conviction as an element of aggravated domestic violence. *See, e.g.*, *State v. Newnom*, 95 P.3d 950, 950–51 (Ariz. Ct. App. 2004); *Murray*, 169 P.3d at 960–61; *Lisle v. Commonwealth*, 290 S.W.3d 675, 678–79 (Ky. Ct. App. 2009); *State v. Bibler*, 17 N.E.3d 1154, 1156 (Ohio Ct. App. 2014); *Reyes v. State*, 314 S.W.3d 74, 81 (Tex. App. 2010); *State v. Ortega*, 142 P.3d 175, 176–77 (Wash. Ct. App. 2006); *cf. State v. Brillon*, 995 A.2d 557, 559–70 (Vt. 2010) (addressing domestic

violence charge joined with contempt charge for violating a protective order). Likewise, a repeat assault upon the same victim may constitute an aggravated offense requiring proof of a prior conviction. *See, e.g.*, *State v. Hambrick*, 75 P.3d 462, 462–63 (Or. Ct. App. 2003).

Sex offenses and invasions of privacy raise similar escalation concerns, so some aggravated sex crimes and stalking offenses require proof of a prior similar conviction. *See, e.g.*, *State ex rel. Thomas v. Talamante*, 149 P.3d 484, 486 (Ariz. Ct. App. 2006) (violent sexual assault); *State v. Roswell*, 196 P.3d 705, 707 (Wash. 2008) (felony communication with a minor for immoral purposes); *State v. Warbelton*, 759 N.W.2d 557, 559, 566–67 (Wis. 2009) (stalking).

Property crimes often require proof of a previous conviction as well. For instance, in several States, a prior conviction for a property crime exposes a defendant to greater criminal liability for a higher degree of property crime. *See, e.g.*, *Tallent v. State*, 951 P.2d 857, 861 (Alaska Ct. App. 1997) (second-degree theft); *State v. Benton*, 526 S.E.2d 228, 229–31 (S.C. 2000) (first-degree burglary). In other States, a prior property conviction can transform a misdemeanor charge into a felony charge. *See, e.g.*, *State v. Lara*, 379 P.3d 224, 225 (Ariz. Ct. App. 2016) (felony shoplifting); *People v. Hicks*, 501 N.E.2d 1027, 1030 (Ill. App. Ct. 1986) (felony theft).

Finally, to prove the offense of escape, the prosecution must often prove that at the time of flight the accused was confined due to a felony conviction. *See, e.g.*, *State v. James*, 81 S.W.3d 751, 761 (Tenn. 2002); *State v. Gonzales*, 693 P.2d 119, 120–21 (Wash. 1985); *cf. Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005) (en banc) (evading arrest).

With so many crimes requiring proof of a prior conviction, States must inevitably—and frequently—address collateral fairness issues attendant to such proof.

2. Even as many offenses require proof of the defendant's criminal status, prevailing norms of criminal procedure encourage joinder of offenses and consolidation of trials. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 537 (1993); *State v. Jones*, 662 A.2d 1199, 1209 (Conn. 1995). "Joint trials 'play a vital role in the criminal justice system.'" *Zafiro*, 506 U.S. at 537 (quoting *Richardson v. Marsh*, 481 U.S. 200, 209 (1987)). Joining multiple offenses for a single trial conserves scarce judicial and prosecutorial resources, reduces inconvenience to witnesses and jurors, and minimizes the chance of incongruous results. *See, e.g.*, *State v. Dunkins*, 460 N.E.2d 688, 690 (Ohio Ct. App. 1983).

Although the details of joinder rules vary, all state and federal courts permit joinder of offenses based upon the same conduct or criminal transaction. *See, e.g.*, Ind. Code § 35-34-1-9; 5 Wayne R. LaFave et al.,

Criminal Procedure § 17.1(a), at 2–3 nn.2–6 (4th ed. 2015) (collecting statutes and rules from most States); *accord* Fed. R. Crim. P. 8(a). Joinder is particularly apropos in this context, because separate trials would require the prosecution to put on the same witnesses and evidence with only minor variations from trial to trial. *See, e.g.*, *Carter v. State*, 824 A.2d 123, 133 (Md. 2003); *Dunkins*, 460 N.E.2d at 690; *Mitchell v. State*, 270 P.3d 160, 170–71 (Okla. Crim. App. 2011).

B. Severance and bifurcation ameliorate unfair prejudice that can arise from proof of a defendant's prior convictions

Unsurprisingly, prosecutors and courts generally prefer joint trials, which means that, absent objection from the defense, it is common for charges requiring proof of the defendant's criminal status to be joined for trial with other charges. Yet there is no denying that joint trials in such cases create a risk of unfair prejudice as to non-status-crime charges because a defendant's prior convictions are placed before the jury. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (discussing the rationale underlying the common law's treatment of prior-crimes evidence).

Accordingly, when defendants object to joint trials, courts use three general approaches to reduce or eliminate that risk: (1) severance; (2) bifurcation; or (3) curative measures, such as stipulations and limiting instructions. *See, e.g.*, *State v. Burns*, 344

P.3d 303, 317 (Ariz. 2015) (approving all three as viable options); *People v. Peterson*, 656 P.2d 1301, 1305 (Colo. 1983) (same).

1. Severance means separate trials before different juries, which is what Currier received. Trying the charges that do not require proof of a prior conviction separately reduces the chance that the jury will learn of the defendant's criminal status—and be influenced by it—while determining the defendant's guilt or innocence on those non-status-crime charges.[1] *See, e.g., Hackney*, 504 S.E.2d at 388–89. Trial courts in almost every State have discretion to sever otherwise properly joined charges if joinder appears to prejudice the defendant. *See, e.g.*, Ind. Code § 35-34-1-11; *accord* Fed. R. Crim. P. 14. *But see Walker v. State*, 635 S.E.2d 740, 748 (Ga. 2006) (holding that trial courts cannot sever a felon-in-possession charge from other charges); *People v. Wells*, 35 N.Y.S.3d 795, 800 (N.Y. App. Div. 2016) (explaining that under N.Y. Crim. Proc. Law § 200.20[3] a court's discretion to grant severance is strictly limited). Fifteen States require or have a presumption in favor of severance when a defendant is charged with both status and non-status crimes.

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[1] Severance does not eliminate the potential for the defendant's criminal past to be admitted into evidence; it may still be admissible to prove motive, opportunity, intent, or plan, or to impeach the defendant. *See, e.g.*, Fed. R. Evid. 404(b)(2); Fed. R. Evid. 609.

Like Virginia, courts in Alabama, Florida, Illinois, Missouri, and Pennsylvania generally require (upon timely request of the defendant) severance of a felon-in-possession charge from other charges. *Anderson v. State*, 886 So. 2d 895, 896–98 (Ala. Crim. App. 2003); *State v. Vazquez*, 419 So. 2d 1088, 1090–91 (Fla. 1982); *People v. Edwards*, 345 N.E.2d 496, 498–99 (Ill. 1976); *State v. Cook*, 673 S.W.2d 469, 472–73 (Mo. Ct. App. 1984); *Commonwealth v. Jones*, 858 A.2d 1198, 1206–08 (Pa. Super. Ct. 2004); *Hackney*, 504 S.E.2d at 388–89. And Texas requires, upon timely request by the defense, severance in *any* case where the charges are based on a single episode of criminal conduct. Tex. Penal Code Ann. § 3.04(a); *Graham v. State*, 19 S.W.3d 851, 852 n.2 (Tex. Crim. App. 2000).

Furthermore, Alaska, Arizona, Colorado, Kentucky, Nevada, New Jersey, New Mexico, and Utah require severance upon a defendant's request unless the parties agree to prevent the jury from learning of the defendant's prior crimes while it considers the other charges. *See Elerson v. State*, 732 P.2d 192, 195 (Alaska Ct. App. 1987); *Burns*, 344 P.3d at 316; *Peterson*, 656 P.2d at 1305; *Wallace v. Commonwealth*, 478 S.W.3d 291, 302 (Ky. 2015); *Brown v. State*, 967 P.2d 1126, 1131 (Nev. 1998); *State v. Ragland*, 519 A.2d 1361, 1363–64 (N.J. 1986); *State v. Garcia*, 246 P.3d 1057, 1065 (N.M. 2011); *State v. Long*, 721 P.2d 483, 495 (Utah 1986).

Arkansas has a presumption in favor of severance, but its Supreme Court declined to adopt a per se rule requiring it. *See Sutton v. State*, 844 S.W.2d 350, 352–54 (Ark. 1993).

In federal court, the Third Circuit requires courts to sever (or bifurcate) a felon-in-possession charge from other charges if evidence of the prior conviction is not independently admissible with respect to the other charges. *See United States v. Joshua*, 976 F.2d 844, 847–48 (3d Cir. 1992), *abrogated on other grounds by Stinson v. United States*, 508 U.S. 36 (1993); *United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980).

Other circuits entrust the decision whether to sever a felon-in-possession charge from other charges to the district court's discretion and reverse it only upon a showing of abuse. *See, e.g., United States v. Ouimette*, 753 F.2d 188, 193 (1st Cir. 1985); *United States v. Page*, 657 F.3d 126, 129–32 (2d Cir. 2011); *United States v. Silva*, 745 F.2d 840, 843–44 (4th Cir. 1984); *United States v. Rice*, 607 F.3d 133, 141–42 (5th Cir. 2010); *United States v. Lee*, 428 F.2d 917, 920–21 (6th Cir. 1970); *United States v. Aleman*, 609 F.2d 298, 310 (7th Cir. 1979), *superseded by statute on other grounds as stated in Jake v. Herschberger*, 173 F.3d 1059, 1065 n.6 (7th Cir. 1999); *United States v. Rock*, 282 F.3d 548, 552 (8th Cir. 2002); *United States v. Burgess*, 791 F.2d 676, 678–79 (9th Cir. 1986);

United States v. Valentine, 706 F.2d 282, 289–90 (10th Cir. 1983); *United States v. Jiminez*, 983 F.2d 1020, 1022–23 (11th Cir. 1993); *United States v. Daniels*, 770 F.2d 1111, 1115–18 (D.C. Cir. 1985).

2. In lieu of severance, some courts conduct bifurcated proceedings, in which prosecutors try multiple charges to the same jury but in separate phases. That way, the jury does not learn of the defendant's felon status until after it has adjudicated the offenses for which that fact is irrelevant. *See, e.g.*, *Hines v. State*, 794 N.E.2d 469, 472–73 (Ind. Ct. App. 2003), *adopted and incorporated*, 801 N.E.2d 634 (Ind. 2004). In the first phase of a bifurcated proceeding, the jury hears evidence and renders a verdict on the charges for which the accused's criminal status is irrelevant, and in the second phase the same jury (or the judge) hears evidence and renders a verdict on the offense for which criminal status is an essential element. *E.g.*, *Head v. State*, 322 S.E.2d 228, 232 (Ga. 1984) (outlining the manner in which a bifurcated trial should proceed), *overruled in part on other grounds by Ross v. State*, 614 S.E.2d 31, 34 n.17 (Ga. 2005).

Thirteen States require or allow this type of bifurcated proceeding. Alaska, Arizona, Colorado, Kentucky, Nevada, New Jersey, New Mexico, and Utah have endorsed bifurcation as an alternative to mandatory severance. *See Elerson*, 732 P.2d at 195; *Burns*, 344 P.3d at 317; *Peterson*, 656 P.2d at 1305;

Wallace, 478 S.W.3d at 305; *Morales v. State*, 143 P.3d 463, 465–66 (Nev. 2006); *Ragland*, 519 A.2d at 1363–64; *Garcia*, 246 P.3d at 1065; *State v. Reece*, 349 P.3d 712, 735–36 (Utah 2015).

Georgia, Indiana, and Oklahoma require bifurcation when a felon-in-possession charge is joined with other charges. *Head*, 322 S.E.2d at 232; *Pickett v. State*, 83 N.E.3d 717, 719–20 (Ind. Ct. App. 2017); *Chapple v. State*, 866 P.2d 1213, 1217 (Okla. Crim. App. 1993).

Tennessee has deemed bifurcation the "better procedure" for trying multiple offenses when only some charges require proof of criminal status. *State v. Foust*, 482 S.W.3d 20, 46–47 (Tenn. Crim. App. 2015). Similarly, the District of Columbia allows bifurcation in lieu of severance but requires neither. *See Goodall v. United States*, 686 A.2d 178, 184 (D.C. 1996).

Federally, the Third Circuit has approved bifurcation as a permissible alternative to severance. *Joshua*, 976 F.2d at 847–48. The Second and Ninth Circuits, while not requiring severance or bifurcation in every case, have held that either is permissible. *See United States v. Nguyen*, 88 F.3d 812, 815–18 (9th Cir.

1996); *United States v. Jones*, 16 F.3d 487, 492–93 (2d Cir. 1994).[2]

C. Applying issue preclusion to cases like Currier's will deter the use of severance or bifurcation

As the above-cited cases imply, a decision for Currier would have a ripple effect throughout the state and federal courts that require or encourage severance or bifurcation.

1. State courts that require severance often do so on the basis that the efficiency policies underlying joinder are outweighed by the risk of unfair prejudice

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[2] A few jurisdictions even permit bifurcation of the elements of the offense, such that the jury determines the existence of the non-conviction elements of the offense before evidence of the accused's prior conviction is presented. *See Littlepage v. State*, 863 S.W.2d 276, 280–81 (Ark. 1993); *Reece*, 349 P.3d at 735–36. Most States and federal circuit courts that have considered the issue have rejected element-by-element bifurcation, however. *See People v. Fullerton*, 525 P.2d 1166, 1167–68 (Colo. 1974); *State v. Morales*, 160 A.3d 383, 390 (Conn. App. Ct. 2017); *Goodall*, 686 A.2d at 183–84; *State v. Olivera*, 555 P.2d 1199, 1203–04 (Haw. 1976); *People v. Davis*, 940 N.E.2d 712, 722–23 (Ill. App. Ct. 2010); *State v. Owens*, 635 N.W.2d 478, 483–84 (Iowa 2001); *Carter*, 824 A.2d at 133–36; *Rigby v. State*, 826 So. 2d 694, 700 (Miss. 2002); *State v. Young*, 986 A.2d 497, 500–01 (N.H. 2009); *State v. Brown*, 853 A.2d 260, 263 (N.J. 2004); *Williams v. State*, 794 P.2d 759, 762–63 (Okla. Crim. App. 1990); *Brillon*, 995 A.2d at 569 (dicta); *State v. Herbert*, 767 S.E.2d 471, 489–90 (W. Va. 2014); *accord United States v. Jacobs*, 44 F.3d 1219, 1221–23 (3d Cir. 1995) (Alito, J.) (collecting cases).

to the accused from the revelation of his criminal status. *See, e.g., Anderson*, 886 So. 2d at 897; *Edwards*, 345 N.E.2d at 499. But a decision in Currier's favor would significantly alter that balance of interests. Joinder would not only be more efficient for the prosecution but also safer, as it would avoid the risk of not having a fair opportunity to try the accused on all charges arising from a single incident. A state court's balancing might come out differently when that variable is added to the calculus.

Even if a decision for Currier does not sway the courts in those States that already require severance, it would provide disincentive for other States to adopt severance rules. And prosecutors would have every reason to resist severance motions. Indeed, state legislatures or even the people may deem it necessary or advisable to enact statutes or constitutional amendments *prohibiting* severance. *Cf.* Cal. Const. art. 1, § 28(f)(4) ("When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."); *People v. Valentine*, 720 P.2d 913, 914 (Cal. 1986) (explaining that the constitutional amendment in subsection 28(f)(4) was in direct response to a state supreme court decision prohibiting the jury from learning of the prior conviction if the defendant stipulated to it).

The net result could be more cases where the jury learns of criminal history even when deciding charges for which that history is irrelevant. Hence, though a

ruling in Currier's favor could appear to be pro-defendant, its results could be decidedly the opposite.

2. Bifurcation is an alternative to severance that allows the prosecution a fair opportunity to try all charges arising from the same incident while at the same time shielding the jury from evidence of the accused's previous convictions while it contemplates the charges for which the evidence is irrelevant. But if Currier prevails here and double-jeopardy issue preclusion applies when charges are severed, the question arises whether it also applies when they are bifurcated. It should not, and in the event the Court rules for Currier in this case, it should make clear that its decision does not apply to bifurcation scenarios.

It would be unreasonable for an acquittal in the first phase to have preclusive effect on the second phase tried to the same jury: despite the first verdict, the court does not enter final judgment until the end of trial. *See, e.g., Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (explaining that "collateral estoppel" or issue preclusion "means simply that when an issue of ultimate fact has once been determined *by a valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit" (emphasis added)).

At least two courts have acknowledged that the critical fact in *Ashe* was the existence of a final judgment, not merely a verdict. *See State v. Knight*,

835 A.2d 47, 51–53 (Conn. 2003) (holding that issue preclusion did not apply in a bifurcated proceeding where the jury decided some charges while the judge decided others simultaneously); *Copening v. United States*, 353 A.2d 305, 310–11 (D.C. 1976) (same), *superseded by statute on other grounds as stated in Davis v. United States*, 984 A.2d 1255, 1260 (D.C. 2009); *see also Head*, 322 S.E.2d at 232 (explaining that the second phase of a bifurcated proceeding should proceed whether the verdict in the first phase is guilt or acquittal). That said, one state court has suggested that an acquittal in the first phase of a bifurcated proceeding has preclusive effect with respect to the second phase of the same proceeding. *See Galloway v. State*, 809 A.2d 653, 675 (Md. 2002).

If a decision for Currier in this case *did* cast doubt on the permissibility of proceeding to the second phase of a bifurcated trial after an acquittal in the first phase, prosecutors would insist on a unitary proceeding in all cases. More juries, not fewer, would then be exposed to defendants' criminal status. At the very least, the Court should make clear that a decision in Currier's favor leaves room for a bifurcated trial to proceed before the same jury despite a phase-one acquittal.

II. Currier Was Not Given a "Hobson's Choice" Between Two Constitutional Rights

Relying on *Simmons v. United States*, 390 U.S. 377 (1968), the NACDL argues that Currier was improperly required to choose between two constitutional rights, namely, his double-jeopardy right to the issue-preclusive effect of an acquittal and his right not to have his prior convictions placed before the jury. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae*; *see also* Brief for Petitioner 28–32. The problem with this argument, however, is that the Court has already said the second "right" does not actually exist.

A. The Due Process Clause does not under any circumstances preclude evidence of an accused's prior convictions

The Court has on several occasions considered whether prosecutors may place a defendant's prior convictions before a jury and has repeatedly held that constitutional due process principles are no barrier to such evidence.

1. In *Spencer v. Texas*, 385 U.S. 554 (1967), the Court expressly rejected the argument that the Constitution precludes evidence of a defendant's prior convictions. 385 U.S. at 562–69. First, the Court observed, the law of evidence (developed chiefly by the States) had "evolved a set of rules designed to reconcile the possibility that this type of information

will have some prejudicial effect with the admitted usefulness it has as a factor to be considered by the jury for any one of a large number of valid purposes." *Id.* at 562. The Court acknowledged the practical reality that "[t]o say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Id.* Any risk of prejudicial effect is "justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest." *Id.* Indeed, the Court's precedents "nowhere . . . approach the issue in constitutional terms." *Id.* at 563.

Next, the Court in *Spencer* said that, while the Court has "long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," it has never thought that the Constitution ordains it with authority to become "a rule-making organ for the promulgation of state rules of criminal procedure." *Id.* at 563–64. Given "the legitimate state purpose and the long-standing and widespread use" of evidence of prior crimes coupled with limiting instructions, the Court declared "it impossible to say

that because of the possibility of some collateral prejudice the Texas procedure [was] rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases." *Id.* at 564. It observed that its precedents did not "even remotely support[] the proposition that the States are not free to enact habitual-offender statutes . . . and to admit evidence during trial tending to prove allegations required under the statutory scheme." *Id.* at 565–66.

The Court acknowledged that the States had developed "a wide variety of methods of dealing with the problem" of admitting proof of prior convictions in the context of recidivism statutes. *Id.* at 566. Yet determining the "best" trial procedure would require balancing many competing considerations, and to say that a bifurcated trial "is probably the fairest . . . is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment." *Id.* at 567–68. Quoting Justice Cardozo, the *Spencer* Court observed that "a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.'" *Id.* at 564 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

The *Spencer* Court also observed that accepting the petitioners' view would require "substantial

changes in trial procedure in countless local courts around the country." *Id.* at 568. It was unwilling to take that step and thereby transgress fundamental principles of federalism and judicial restraint. *Id.* at 568–69.

2. The Court reaffirmed *Spencer* in *Marshall v. Lonberger*, 459 U.S. 422 (1983), where it approved use of a prior Illinois guilty plea as an aggravator to a murder charge in Ohio, holding "that the admission in the Ohio murder trial of the conviction based on that plea deprived respondent of no federal right." *Id.* at 438 (citing *Spencer*, 385 U.S. 554). "The common law," the Court observed, "was far more ambivalent" with respect to the admissibility of prior-crimes evidence, as demonstrated by the many exceptions to the general rule. *Id.* at 438 n.6. "In short, the common law, like . . . *Spencer*, implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification." *Id.* *Lonberger* confirmed the constitutionality of introducing prior-crimes evidence coupled with limiting instructions. *Id.*

Accordingly, nothing in this Court's decisions supports the idea that Currier's due process rights would have been violated by a single trial in which evidence of his prior convictions would have been admitted to prove the felon-status element of the

firearm charge. In fact, the only time the Court has disapproved admission of prior-crimes evidence to prove an element of the offense, it did so as a matter of evidentiary law, *not* constitutional right. *See Old Chief v. United States*, 519 U.S. 172, 190–92 (1997); *cf. Michelson v. United States*, 335 U.S. 469 (1948) (affirming the admission of prior-crimes evidence for the purpose of cross-examining the defendant's character witnesses).

B. State and federal courts commonly permit evidence of past criminal convictions even where not relevant to all charges

Many States permit the prosecution to introduce evidence of prior convictions where such evidence is relevant to some, but not all, of the charges. In such cases, of course, state courts implement measures to ameliorate the risk of unfair prejudice. At least half the States permit a unitary trial if the prior conviction is stipulated, disclosed to the jury but not described, or limited through a jury instruction, including several of the States that strongly encourage severance or bifurcation. *See Mead v. State*, 445 P.2d 229, 234 (Alaska 1968); *State v. Burns*, 344 P.3d 303, 317 (Ariz. 2015); *People v. Cunningham*, 25 P.3d 519, 557–58 (Cal. 2001); *People v. Peterson*, 656 P.2d 1301, 1305 (Colo. 1983); *State v. Morales*, 160 A.3d 383, 390–93 (Conn. App. Ct. 2017); *Massey v. State*, 953 A.2d 210, 217–19 (Del. 2008); *Williams v. United States*, 75 A.3d 217, 221–22 (D.C. 2013); *State v.*

Hilongo, 645 P.2d 314, 315 (Haw. 1982); *State v. Wilske*, 350 P.3d 344, 346–48 (Idaho Ct. App. 2015); *Hines v. State*, 794 N.E.2d 469, 474 (Ind. Ct. App. 2003), *adopted and incorporated*, 801 N.E.2d 634 (Ind. 2004); *State v. Owens*, 635 N.W.2d 478, 482–84 (Iowa 2001); *State v. Gander*, 551 P.2d 797, 799–800 (Kan. 1976); *State v. Graps*, 42 So. 3d 1066, 1070–71 (La. Ct. App. 2010); *State v. Fournier*, 554 A.2d 1184, 1186–87 (Me. 1989); *Carter v. State*, 824 A.2d 123, 131–33 (Md. 2003); *People v. Mayfield*, 562 N.W.2d 272, 274–75 (Mich. Ct. App. 1997); *Richardson v. State*, 74 So. 3d 317, 324 (Miss. 2011); *State v. Mowell*, 672 N.W.2d 389, 404 (Neb. 2003); *State v. Wood*, 647 S.E.2d 679, 683–84 (N.C. Ct. App. 2007); *State v. Dunkins*, 460 N.E.2d 688, 690–91 (Ohio Ct. App. 1983); *Warren v. Baldwin*, 915 P.2d 1016, 1021–22 (Or. Ct. App. 1996); *State v. Anderson*, 458 S.E.2d 56, 57–58 (S.C. Ct. App. 1995); *State v. Vu*, 405 P.3d 879, 883 & n.5 (Utah Ct. App. 2017); *State v. Thompson*, 781 P.2d 501, 504 (Wash. Ct. App. 1989); *State v. Prescott*, 825 N.W.2d 515, 518–21 (Wis. Ct. App. 2012).

The majority of the federal circuits also do not require severance or bifurcation and instead rely on curative measures in a unitary proceeding. *See, e.g.*, *United States v. Hackley*, 662 F.3d 671, 684 (4th Cir. 2011); *United States v. Rice*, 607 F.3d 133, 141–42 (5th Cir. 2010); *United States v. Stokes*, 211 F.3d 1039, 1042–43 (7th Cir. 2000); *United States v. Kind*, 194 F.3d 900, 906 (8th Cir. 1999); *United States v.*

Nguyen, 88 F.3d 812, 815–18 (9th Cir. 1996); *United States v. Jones*, 213 F.3d 1253, 1260–61 (10th Cir. 2000); *United States v. Jiminez*, 983 F.2d 1020, 1022 (11th Cir. 1993); *United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997).

To be sure, the Second, Ninth, and D.C. Circuits have expressed concern over joining felon-in-possession charges with other charges for a unitary trial, and each has expressed doubt as to the utility of limiting instructions. *See United States v. Jones*, 16 F.3d 487, 492–93 (2d Cir. 1994); *United States v. Lewis*, 787 F.2d 1318, 1322–23 (9th Cir. 1986); *United States v. Daniels*, 770 F.2d 1111, 1115–18 (D.C. Cir. 1985). But even those courts have held that severance is not required in every case. *Compare Jones*, 16 F.3d at 493 (severance required), *Lewis*, 787 F.2d at 1322–23 (same), *and United States v. Dockery*, 955 F.2d 50, 54–56 (D.C. Cir. 1992) (same), *with United States v. Page*, 657 F.3d 126, 129–32 (2d Cir. 2011) (severance not required), *United States v. Burgess*, 791 F.2d 676, 678–79 (9th Cir. 1986) (same), *and Daniels*, 770 F.2d at 1115–18 (same).

Accepting NACDL's argument would cast serious doubt on the constitutionality of the trial procedures followed in the majority of American courts. Just as in *Spencer*, taking "such a step would be quite beyond the pale of this Court's proper function in our federal system" and "be a wholly unjustifiable encroachment by this Court upon the constitutional power of States

to promulgate their own rules of evidence to try their own state-created crimes in their own state courts." 385 U.S. at 568.

Constitutionalizing rules of evidence would also put prosecutors in an untenable position: They could not sever (or perhaps even bifurcate) trials without risking issue preclusion if they lose the first phase, but they also could not introduce the necessary evidence of the predicate prior conviction into a joint trial. Accordingly, the Court should stand by its precedents holding that evidence of former crimes is a matter of evidentiary law, not due process.

C. Prosecutors and courts may hold criminal defendants to the procedural consequences of their strategic choices

Because Currier was not forced to choose between two constitutional rights, it follows that there is no justification—constitutional or equitable—for allowing him to claim double jeopardy protection from a situation to which he agreed and from which he benefitted. His situation is not comparable to *Simmons*, where the defendant had to choose between his Fourth Amendment right against unreasonable searches and seizures and his Fifth Amendment privilege against self-incrimination. 390 U.S. at 389–94. Although the Constitution may ordinarily forbid States from forcing the accused to forgo one constitutional right to exercise another, it does not

forbid the defendant from being forced to make difficult strategic choices, such as, for example, whether to testify or plead guilty. Defendants are often required to make "difficult judgments as to which course to follow," and even when the choice involves a constitutional right, "the Constitution does not by that token always forbid requiring [them] to choose." *McGautha v. California*, 402 U.S. 183, 213 (1971), *reh'g granted, judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972). Instead, courts ask "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.*

Again, Currier was not forced to choose between constitutional rights. The right he claims to have been infringed—his protection against double jeopardy—is intended to safeguard individuals from government overreach and oppression. *See, e.g., Ohio v. Johnson*, 467 U.S. 493, 498–99 (1984). But everything Currier complains about arose because *he* desired severance of the charges. A State that assents to the procedure requested by the defendant can hardly be said to be overreaching or to be oppressing the defendant. The Constitution grants criminal defendants the right to choose a strategy, but it does not grant them the right to be free from the consequences of that choice.

CONCLUSION

For these reasons, the judgment of the Virginia Supreme Court should be affirmed.

Respectfully submitted,

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No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

As the only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. To this end, NACDL files numerous *amicus curiae* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of critical importance to NACDL's members and the fair administration of justice: whether a criminal defendant effectively waives the protections of the Double Jeopardy Clause by consenting to severance of claims in order to avoid an unduly prejudicial trial.

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have filed letters with the Court providing blanket consent to the filing of *amicus* briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

A jury acquitted petitioner Michael Currier of burglarizing a home and stealing a safe that contained cash and guns, finding that Currier was not at the scene of the crime. A second jury at a second trial later convicted Currier on a felon-in-possession-of-a-firearm charge on the theory that he broke into the home and stole the safe, briefly handling the guns inside it in order to remove the cash, before throwing the safe and guns into a nearby river.

No one could reasonably dispute that, ordinarily, a second trial against Currier for felon-in-possession would be a non-starter, since the Double Jeopardy Clause's issue preclusion component forbids the prosecution from re-litigating issues decided against it in a prior trial. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). After all, if Currier didn't break into the home and steal the safe, he couldn't possess the guns inside it. But the court below held that Currier waived his double jeopardy rights by consenting to severance of the felon-in-possession charge from the burglary and theft charges. *See* J.A. 51. The charges were severed under a Virginia law providing that, to avoid unduly prejudicing defendants, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) (en banc).

Petitioner aptly explains the multitude of reasons that this Court should reverse. *Amicus* submits this brief to amplify one particular reason: the decision below is at odds with decades of this Court's jurispru-

dence refusing to find waiver where criminal defendants are put to an unfair Hobson's choice of sacrificing one important right in order to preserve another.

That is precisely what occurred here. Currier faced the choice of enduring either (1) a single trial at which evidence of his prior felony conviction relevant to the felon-in-possession charge would unduly prejudice him with respect to the burglary and theft charges, or (2) sequential trials in which the prosecution at a second trial could re-litigate issues it lost at the first—exactly the type of "dry run" the Double Jeopardy Clause aims to prevent. *Ashe*, 397 U.S. at 447.

This Court should confirm that a choice between either an unfair trial or waiving one's right not to "be twice put in jeopardy of life or limb," U.S. Const. amend. V, is no choice at all—much less a voluntary waiver.

ARGUMENT

I. NO WAIVER OCCURS WHEN A CRIMINAL DEFENDANT IS FORCED TO SACRIFICE ONE IMPORTANT RIGHT TO SECURE ANOTHER

The decision below and others like it have held that, by choosing severance of charges to avoid a prejudicial trial, criminal defendants effectively waive the Double Jeopardy Clause's protection against a second trial on the same issues. *See, e.g.*, Pet. App. 10a (severance occurred "with the defendant's consent and for his benefit"); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988) ("Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead

double jeopardy."). But that view rests on the flawed premise that the defendants exercised a legitimate choice. Sacrificing one important right to preserve another is no "choice" at all.

A. This Court Has Long Refused to Find Waiver Where a Defendant Is Put to a Hobson's Choice

Nearly fifty years ago, this Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). There, the lower court held that the defendant's testimony at a suppression hearing could later be used against him at trial. This Court reversed, holding that the defendant could not be put to the choice "either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* Notably, this Court rejected the lower court's conclusion that the defendant's "voluntary" choice to obtain the "benefit" of testifying to protect his Fourth Amendment rights waived his right against self-incrimination. *Id.* at 393-94.

Applying a similar rationale, this Court rejected a law that required an officer of a political party to either waive his right against self-incrimination and testify in response to a subpoena or else be barred from political office, thereby forgoing his First Amendment "right to participate in private, voluntary political associations." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977). Citing *Simmons*, the Court explained that the law unfairly "require[d] [the officer] to forfeit one constitutionally protected right as the price for exercising another." *Id.* at 807-08.

Beyond situations involving an unfair choice between two constitutional rights, this Court has refused to find voluntary waiver when the "choice" was to forgo a constitutional right or face some serious hardship. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Court found it impermissible to require public employees either to answer questions by criminal investigators, or else lose their jobs. "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice . . . ." *Id.* at 497. This Court thus found statements made to investigators under such circumstances inadmissible, rejecting the argument that the defendants' voluntary choice to answer questions constituted a "waiver": "Where the choice is between the rock and the whirlpool, duress is inherent in deciding to waive one or the other." *Id.* at 498 (internal quotation marks omitted). In short, "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Id.* at 500; *accord Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968) (holding that police officer appearing before grand jury could not be put to "Hobson's choice" of waiving immunity or losing job).

Similarly, the Court held that defendants could not be forced to "choose" between either contesting guilt at trial or avoiding a death penalty charge. *United States v. Jackson*, 390 U.S. 570, 581-82 (1968). The option to either risk one's life or exercise the right to a trial by jury was not a valid "choice"—the law "impose[d] an impermissible burden upon the exercise of a constitutional right." *Id.* at 572, 582-83.

And notably, this Court has found that a defendant does not waive the double jeopardy protection by exercising his right to challenge his conviction and successfully obtaining a reversal on appeal. *See Green v.*

United States, 355 U.S. 184, 191-92 (1957). "When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." *Id.* As the Court explained, "it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Id.* at 192.

Relying on this Court's precedents, federal courts of appeals likewise have rejected putting defendants to a Hobson's choice of sacrificing one important right to preserve another. Lower courts thus have held that a defendant cannot be put to sacrifice one constitutional right to secure another. *United States v. Inmon*, 568 F.2d 326, 333 (3d Cir. 1977) (under *Simmons*, a defendant cannot "be required, as the cost of litigating what he and his counsel believe to be a valid fifth amendment double jeopardy claim, to waive the fifth amendment privilege against self-incrimination in a later trial"). They likewise have rejected a "coerced choice" of having to forgo an important non-constitutional right in order to exercise a constitutional right. *Hunt v. Mitchell*, 261 F.3d 575, 584 (6th Cir. 2001) ("While [the defendant's] statutory right to a speedy trial under Ohio law may not equate precisely to his constitutional right to a speedy trial under the Sixth Amendment, the element of coerced choice decried by the Court in *Simmons* is nevertheless present here." (citation omitted)).

B. *Jeffers* Indicates That Sacrificing Double Jeopardy Rights to Avoid a Prejudicial Trial Is an Unfair Hobson's Choice

While not every hard choice a criminal defendant faces is invalid, the principles above apply with full force where "compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *McGautha v. California*, 402 U.S. 183, 213 (1971), *judgment vacated sub nom.*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

Indeed, after the Court decided *McGautha*, a plurality of this Court observed that forcing a defendant to choose between waiving double jeopardy protection or the admission of prejudicial evidence at a single trial could result in the very Hobson's choice this Court has found impermissible. In *Jeffers v. United States*, 432 U.S. 137 (1977), the defendant successfully opposed the government's motion for a consolidated trial on two indictments charging greater and lesser offenses. *Id.* at 143. After the jury convicted the defendant of the lesser offense, he sought to bar the prosecution from trying him for the greater offense in a second trial. *Id.* at 144. A plurality of this Court concluded that, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding," there was no double jeopardy violation because the defendant "elect[ed] to have the two offenses tried separately." *Id.* at 152. The Court reasoned in part that a single trial on lesser and greater offenses "could have taken place without undue prejudice to petitioner's Sixth Amendment right to a fair trial." *Id.* at 153.

Critically, however, the plurality noted that the outcome might be different—and that *Simmons* would

be implicated—had the defendant sought severance to avoid undue prejudice:

> Petitioner argues that a finding of waiver is inconsistent with the decision in *Simmons v. United States*, . . . where the Court held that a defendant could not be required to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert an arguably valid Fourth Amendment claim. In petitioner's case, however, the alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy claim is illusory. Had petitioner asked for a . . . severance from the other defendants, the case might be different. In that event, he would have given the court an opportunity to ensure that prejudicial evidence relating only to other defendants would not have been introduced in his trial. . . . No such motion, however, was made. Under the circumstances of this case, therefore, no dilemma akin to that in *Simmons* arose.

Id. at 153 n.21. As explained below, Currier faced precisely such a "dilemma" in the present case.

II. A DEFENDANT DOES NOT WAIVE DOUBLE JEOPARDY RIGHTS BY CHOOSING SEVERANCE TO AVOID AN UNFAIR TRIAL

Under the decision below, a defendant charged with felon-in-possession and other offenses faces the sort of Hobson's choice that this Court has held cannot constitute a valid waiver. On the one hand, if the defendant chooses a single trial of all charges, the jury

would learn of his prior conviction, unduly prejudicing him with respect to the substantive charges. On the other hand, if the defendant chooses to sever the felon-in-possession charge, he waives his double jeopardy rights if the first jury acquits. In either event, the defendant must sacrifice one important right to preserve the other. Neither can constitute a valid waiver.

A. Evidence of a Prior Felony Is Unduly Prejudicial

1. This Court "has long recognized . . . [that] the introduction of evidence of a defendant's prior crimes risks significant prejudice." *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). This principle derives from a "common-law tradition" in which a "defendant's prior trouble with the law . . . [or] specific criminal acts . . . [were] said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

The Federal Rules of Evidence incorporate protections against such prejudice. Rule 403 permits exclusion of evidence if its probative value is substantially outweighed by a danger of unfair prejudice. For criminal defendants, "unfair prejudice . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (internal quotation marks omitted). One of the evils that Rule 403 seeks to eliminate is the use of propensity evidence to convict a defendant. As this Court has observed, "[a]lthough . . . propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves

punishment—creates a prejudicial effect that outweighs ordinary relevance." *Id.* at 181 (second alteration in original) (internal quotation marks omitted).

Other rules likewise seek to guard against the inherent prejudice from a jury hearing about a defendant's prior crimes. Rule 404(b) specifically excludes "[e]vidence of a crime, wrong, or other act" offered "to prove a person's character" and thereby the person's likelihood of committing other crimes. Fed. R. Evid. 404(b)(1).

The Federal Rules of Criminal Procedure employ safeguards based on the same principles. While Rule 8(a) authorizes joinder of multiple charges in a single indictment, Rule 14 allows courts to sever charges if sufficient prejudice would result from a single trial.

2. These rules are backed up by decades of studies showing the inherent prejudice that occurs when a jury is informed of a defendant's prior convictions. *See* Kathryn Stanchi & Deirdre Bowen, *This Is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?*, 89 Wash. L. Rev. 901, 911 & n.36 (2014) (collecting studies). "Most studies show that admission of a defendant's prior conviction leads to more guilty verdicts in criminal trials . . . ." *Id.* at 911.

Studies generally have shown that "[t]he evidence against a defendant with a prior record appears stronger to [a] jury" because jurors use past convictions "to develop propensity judgments and other generally negative evaluations of a defendant." Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1361 (2009).

For example, a study of 160 mock jurors found that disclosure of a defendant's prior conviction substantially increased the number of jurors who reached a guilty verdict after reading the facts of the case, witness and defendant testimony, and jury instructions. *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & Hum. Behav. 37, 39, 41-43 (1985). Mock jurors were also twice as likely to convict an alleged auto thief if he had a prior conviction for a dissimilar crime, and even more likely to convict when they learned that the defendant had a prior auto theft conviction. *See id.* at 43 tbl.2. These results hold true for defendants charged with murder. *See id.* Overall, mock jurors elected to convict defendants with prior criminal records at significantly higher rates than defendants who lacked any criminal history. *See id.*

In another study of 105 participants given a summary of a real bank-robbery trial transcript, 40% of the subjects voted to convict when told that the defendant had a prior conviction, versus only 17% of subjects who were unaware of any prior conviction. *See* Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & Hum. Behav. 67, 70-72 (1995). Subjects who learned of the prior conviction also viewed the defendant as "less credible and more dangerous." *Id.* at 74.

Analyses of actual trials generally have shown similar results. One study evaluating juror questionnaires distributed following trials in multiple jurisdictions found that jurors were more likely to convict after learning of a prior conviction when the jurors otherwise found the evidence weak; the effect of learning of the prior conviction was not pronounced in cases

where jurors felt that the evidence was already strong. *See* Eisenberg and Hans, *supra*, at 1386. Thus, in cases with weaker evidence of guilt, "[t]he prior record effectively leverage[d] the existing evidence over the threshold needed to support conviction." *Id.* at 1385. While some have questioned the full extent of such prejudice, *see* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. Crim. L. & Criminology 493, 497-500 (2011), the consensus remains that informing a jury of a defendant's prior conviction is unduly prejudicial, *see, e.g.*, 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 1.2 (2016) (summarizing consensus in literature); Richard Lempert, *The American Jury System: A Synthetic Overview*, 90 Chi.-Kent L. Rev. 825, 833 n.19 (2015) (similar).

Evidence of a prior conviction is so prejudicial, studies show, that its effect on jurors cannot be mitigated by a judge's limiting instructions. To the contrary, instructions intended to restrict the jury's consideration of a prior conviction may actually "backfire," increasing the prejudice to the defendant by calling the jury's attention to his prior criminal record. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407, 425-30 (2013); *see also* Stanchi & Bowen, *supra*, at 911 n.36 (collecting studies). "[L]imiting instructions are not a reliable method for eliminating the negative impact of criminal records." Eisenberg & Hans, *supra*, at 1361. "With few exceptions, empirical research has repeatedly demonstrated that . . . limiting instructions are unsuccessful at controlling jurors' cognitive processes." Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity*

and Other Inadmissible Evidence, 6 Psychol., Pub. Pol'y, & L. 677, 686 (2000).

Lower courts and members of this Court have recognized the ineffectiveness of limiting instructions in this context. Adhering to such a limiting instruction is "a mental gymnastic which is beyond, not only [a jury's] powers, but anybody's else." *See Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.). "[A]ll practicing lawyers know to be unmitigated fiction" the notion "that prejudicial effects can be overcome by instructions to the jury." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Certain categories of evidence "are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give." *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring).

Moreover, although many studies do not distinguish among prior convictions, research suggests that both the nature of the prior offense and its similarity to the present charge negatively impact jurors' impressions of a defendant. *See* Eisenberg & Hans, *supra*, at 1361. As this Court has observed, "[w]here a prior conviction was for a gun crime or one similar to other charges in a pending case[,] the risk of unfair prejudice would be especially obvious." *Old Chief*, 519 U.S. at 185.

3. Studies reporting the prejudicial effect of prior conviction evidence are consistent with common sense, as well as the experiences of felons outside the judicial system. Stigma against individuals like Currier based on a prior felony conviction manifests in a variety of contexts well beyond the courtroom doors. In employment, a prior felony conviction makes securing a

second interview or a job offer substantially more difficult. *See* Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Annals Am. Acad. Pol. & Soc. Sci. 195, 199 (2009). Empirical inquiries have revealed a pronounced negative impact of a prior conviction on employment outcomes, and have anecdotally revealed that many employers use criminal records as a screening mechanism for applicants. *See* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 955-56 (2003). In post-secondary education, many colleges and universities now collect and examine applicants' criminal histories as a component of the admissions process, thereby erecting an additional barrier to advancement for individuals with prior convictions. *See* Matthew W. Pierce et al., *The Use of Criminal History Information in College Admissions Decisions*, 13 J. Sch. Violence 359, 360 (2014).

More broadly, studies reveal deeply negative public attitudes towards those previously incarcerated. *See* Candalyn B. Rade et al., *A Meta-Analysis of Public Attitudes Toward Ex-Offenders*, 43 Crim. Just. & Behav. 1260, 1260-63 (2016). Stigma and prejudice against prior offenders result in public desire to maintain social distance and erect barriers to accessing community resources and housing. *Id.* at 1260-61. These impacts are more acute and pronounced for felons than misdemeanants. *Id.* at 1262.

4. In light of the deeply rooted prejudices that juries and society at large harbor against felons, "[a] defendant's interest in avoiding introduction of prior crimes evidence [at trial] is clear and compelling." *United States v. Dockery*, 955 F.2d 50, 53 (D.C. Cir. 1992). When a defendant is tried on felon-in-possession and

other charges simultaneously, there is an obvious risk that the defendant will suffer the "unfair prejudice" of the jury "generalizing [the] defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief*, 519 U.S. at 180-81. In *Old Chief*, the defendant, concerned that admission of his prior felony conviction would unduly influence the jury with respect to his felon-in-possession charge, offered to stipulate to his status as a convicted felon. *Id.* at 175. This Court held that admission of a prior felony conviction, over a defendant's offer to stipulate, was reversible error because the "admi[ssion] . . . of the defendant's prior crimes . . . raises the risk of a verdict tainted by improper considerations." *Id.* at 197 (internal quotation marks omitted).

For these reasons, "[a]ll of the Circuit Courts seem to agree that trying a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges . . . ." *United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996); *see also United States v. Miles*, 96 F.3d 491, 495 (D.C. Cir. 1996) ("We have long recognized that where a felon-in-possession charge is joined with other counts, the defendant may be unduly prejudiced with respect to the other counts by the introduction of prior crimes evidence . . . .").

Admitting evidence of a defendant's prior felony convictions can "rise to the level of a constitutional violation . . . if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."

United States v. Lane, 474 U.S. 438, 446 n.8 (1986). "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause . . . provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *see also, e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976) (holding that admission at trial of defendants' post-arrest silence violated due process); *Foster v. California*, 394 U.S. 440, 442-43 (1969) (holding that use of overly suggestive identification procedure for purpose of identifying suspect violated due process).

But under the decision below, a defendant must accept the admission of unduly prejudicial evidence in a single trial on felon-in-possession and other charges, or incur a forced waiver of the double jeopardy protection against re-litigation of issues the prosecution already lost in a first trial.

B. Allowing Prosecutors to Re-litigate Issues They Lost Is Antithetical to the Double Jeopardy Clause

While a single trial on felon-in-possession and other charges is unduly prejudicial to the defendant, so too is the prospect of allowing the prosecution, at a second trial, to re-litigate issues that it lost at the first.

1. The "underlying idea" of the Double Jeopardy Clause is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). "[P]ermitting the sovereign freely to subject the citizen to a second trial for

the same offense would arm [the] Government with a potent instrument of oppression." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Importantly, the issue preclusion component of the Double Jeopardy Clause "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009).

Issue preclusion secures the finality and sanctity of acquittals, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen*, 430 U.S. at 571. "[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment [of acquittal]." *United States v. Scott*, 437 U.S. 82, 92 (1978). Verdicts of acquittal accordingly are entitled to "special weight," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982), and "particular significance," *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (internal quotation marks omitted).

Issue preclusion also prevents the unfairness of allowing the prosecution a practice run of trying a defendant more than once. "[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *Id.* at 128. Indeed, the Court in *Ashe* forcefully rejected prosecutors' admitted use of a first trial as a "dry run" for an acquitted defendant's subsequent prosecution on charges stemming from the same criminal episode in which a jury had already found the defendant did not participate. 397 U.S. at 447. The second jury in *Ashe* convicted the defendant after hearing testimony that was "substantially stronger" on a key issue than the prosecution had offered at the first trial, which ended in acquittal. *Id.* at 440. Such an outcome is "precisely

what the constitutional guarantee forbids." *Id.* at 447. The prohibition against affording the government "the proverbial 'second bite at the apple'" is "central to the objective of the [Clause's] prohibition against successive trials." *Burks v. United States*, 437 U.S. 1, 11, 17 (1978).

Here, Currier's second trial presented all of the problems with sequential prosecutions that the Double Jeopardy Clause aims to prevent. After two prosecution witnesses floundered in the first trial, prosecutors returned at the second trial with more polished witnesses whose testimony was sought to prove that Currier was at the scene of the crime. *Compare* J.A. 16, *with id.* at 72-73. After having evidence (a cigarette butt found in the co-defendant's truck) excluded from the first trial for failure to turn it over to the defense in time, the prosecution fixed the procedural violation and used the cigarette butt to convict Currier in the second trial. *Compare id.* at 31-32, *with id.* at 83-84. The evidence was weak because Currier and his co-defendant were friends, and thus Currier might have ridden in the truck and smoked the cigarette at any time, not just the day of the crime. But bolstered by the enhanced witness testimony, prosecutors leveraged the cigarette-butt evidence as proof that Currier was at the scene. All of this was *after* the first jury had already determined that Currier was not at the scene and played no role in the theft. Providing the prosecution an opportunity to refine its case after an acquittal is "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447.

2. While defendants need not establish prosecutorial abuse to invoke issue preclusion under *Ashe*, *see* Pet. Br. 18-23, the Court in *Ashe* recognized that issue

preclusion protects against prosecutorial overreaching. Unlike in English common law and early American practice, in which "[a] single course of criminal conduct was likely to yield but a single offense," the higher volume of overlapping but highly specific modern criminal statutes makes it "possible for prosecutors to spin out a startingly numerous series of offenses from a single alleged criminal transaction," rendering "the potential for unfair and abusive reprosecutions . . . far more pronounced." *Ashe*, 397 U.S. at 445 n.10.

This concern is particularly acute here, where the felon-in-possession charge was premised on the theory that petitioner briefly "handle[d]" the guns inside the safe and "la[id] them down on the bed" of the truck in order to remove the cash. J.A. 94. There was no allegation that petitioner "possessed" the guns for any purpose other than moving them aside to get to the money in the safe. To the contrary, the prosecution's theory was that petitioner discarded the safe and guns in a river after removing the cash. Thus, Currier's "possession" of the weapons in this case "d[id] not offend" a key goal of felon-in-possession laws—to "keep[] guns out of the hands of convicted felons." *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000). The felon-in-possession charge against Currier was aggressive and tenuous at best. But it allowed the prosecution to try petitioner twice for the same alleged criminal episode. The decision below thus could encourage similar overcharging.

In sum, while severing the felon-in-possession charge avoids the risk of undue prejudice from the prior conviction, the option to endure a second trial and "run the gantlet a second time" is no more favorable. *Ashe*, 397 U.S. at 446 (internal quotation marks omitted). Under this Court's precedents, putting a defendant to the choice of waiving one right or the other is "intolerable." *Simmons*, 390 U.S. at 394.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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